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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 190

FRANK CARMINE NARDONE, AUSTIN L. CALLAHAN, HUGH BROWN AND ROBERT GOTTFRIED, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 3, 1937.

CERTIORARI GRANTED OCTOBER 11, 1937.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

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[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

FRANK CARMINE NARDONE, Alias FRANK CARMINE; AUSTIN L. CALLAHAN, Hugh Brown and Robert Gottfried, Alias Robert Godfrey, alias Robbie

STATEMENT UNDER RULE 13

The indictment herein was filed on May 15, 1936, against Pierre Le Veque, Frank Carmine Nardone, Austin L. Callahan, Hugh Brown and Robert Gottfried, alleging violations of U. S. C. Title 19, Sections 1593a, and 1593b, U. S. C. Title 18, Section 550, and U. S. C. Title 18, Section 88. The defendants were arraigned before Hon. William Bondy, U. S. D. J., on May 18, 1936, and each pleaded not guilty. The bail of the individual defendants was fixed at $2,000. The trial of all the defendants was commenced before Hon. Grover M. Moscowitz, U. S. D. J., and a jury on December 16, 1936, at which time, Pierre Le Veque pleaded guilty. Bail as to the other defendants was cancelled and they were remanded to jail during the trial which continued to and was concluded on December 23, 1936. After the verdict the defendants remained in custody [fol. 2] until they appeared for sentence on December 30, 1936. The defendants Callahan, Brown and Gottfried were sentenced to a year and a day as to each count, to run concurrently. The defendant Nardone was sentenced to a year and a day on the first count; two years on the second count; two years on the third count; the second and third counts to run concurrently as to each other and to be served after the expiration of the sentence on Count 1. A notice of appeal was filed by the defendants on December 30, 1936, and on December 31, 1936, the defendants, with the exception of Hugh Brown, were released on bail pending appeal.

[fol. 3] IN UNITED STATES DISTRICT COURT.

C 98/300

THE UNITED STATES OF AMERICA

vs.

PIERRE LE VEQUE, FRANK CARMINE NARDONE, AUSTIN L. CALLAHAN, HUGH BROWN and ROBERT GOTTFRIED, Defendants

INDICTMENT—Filed in Open Court May 15, 1936

Smuggling alcohol into the United States and conspiracy so to do.

Title 19, U. S. C.
Section 1593b; Title 19 U. S. C.
Section 1593a; Title 18.
Section 550; U. S. C. Title 18.
Section 88.

Lamra Hardy United States Attorney.

A True Bill.
May 18th, 1936, bail continued $2,000.00. William Bondy.

[fol. 4] SOUTHERN DISTRICT OF NEW YORK, ss:

The grand jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Southern District of New York and inquiring for that district upon their oaths present:

That heretofore, to wit, on or about the 17th day of March, 1936, at the Southern District of New York and within the jurisdiction of this Court, Pierre Le Veque alias Durant, alias Durand alias George Woodrow, Frank Carmine Nardone, alias Frank Carmine, Austin L. Callahan, Hugh Brown and Robert Gottfried, alias Robert Godfrey, alias Robbie, the defendants herein, did unlawfully, wilfully and knowingly and with intent to defraud the revenue of the United States, smuggle and clandestinely introduce into the United States without making dutiable consumption entry thereof, at the United States Custom House and Port of Entry with the United States Collector of Customs at the Port of New York, and without paying the duty thereon, certain merchandise, to wit, approxi-

mately 9,600 gallons of alcohol, which merchandise was subject to duty and should have been invoiced and for which merchandise dutiable consumption entry should have been made at the United States Custom House and Port of Entry [fol. 5] with the United States Collector of Customs at the Port of New York, and that the said defendants then and there well knew that dutiable consumption entry for the said merchandise had not been made at the United States Custom House and Port of Entry with the United States Collector of Customs at the Port of New York and that no invoice for the said merchandise was filed with the Collector of Customs at the Port of New York, and that the duty thereon was not paid as required by law; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (*U. S. C. Title 19, Sec. 1593a*; U. S. C. Title 18, Sec. 550).

Second Count

And the grand jurors aforesaid, on their oath aforesaid, do further present that heretofore, to wit, on or about the 17th day of March, 1936, at the Southern District of New York and within the jurisdiction of this Court, Pierre Le Veque alias Durant, alias Durand, alias George Woodrow, Frank Carmine Nardone alias Frank Carmine, Austin L. Callahan, Hugh Brown and Robert Gottfried alias Robert Godfrey, alias Robbie, the defendants herein, did unlawfully, wilfully, knowingly and fraudulently receive and conceal merchandise which had been imported and brought into the United States contrary to law, and which the defendants then and there well knew had been imported and brought into the United States contrary to law, in that the said [fol. 6] merchandise had not been invoiced and entered at the United States Custom House and Port of Entry with the United States Collector of Customs at the Port of New York, and in that the duty on the said merchandise as required by the Tariff Act of 1930 had not been paid, which said merchandise consisted of approximately 9,600 gallons of alcohol and for which said merchandise dutiable consumption entry should have been made at the United States Custom House and Port of Entry with the United States Collector of Customs at the Port of New York, and for which said merchandise an invoice should have been filed with the United States Collector of Customs at the Port

of New York and on which merchandise duty should have been paid, as required by law, all of which the defendants then and there well knew; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (U. S. C. Title 19, Sec. 1593b).

Third Count

And the grand jurors aforesaid, on their oath aforesaid, do further present that heretofore, to wit, beginning on or about the 15th day of October, 1935, and continuing up to the date of the filing of this indictment, at the Southern District of New York and within the jurisdiction of this Court, and at other places, Pierre Le Veque alias Durant, alias Durand alias George Woodrow, Frank Carmine Nardone alias Frank Carmine, Austin L. Callahan, Hugh Brown and Robert Gottfried alias Robert Godfrey alias [fol. 7] Robbie, the defendants herein, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other and with Harry Ducos, James Bellman, Walter Adams, William Kleb, Jr., John Saunders, Nathan W. Hoffman, Burt Erickson, George H. Geiger and Harry Rosen, not named as defendants herein, and with divers other persons to the grand jurors unknown, to defraud the United States and to commit divers offenses against the United States, to wit, to violate the provisions of the Tariff Act of 1930, and more specifically Title 19 U. S. C., Sections 1593a and 1593b, and the provisions of the Act commonly known as the Anti-Smuggling Act, approved August 5, 1935, in the following manner, that is to say:

It was a part of said conspiracy that the said defendants and others would unlawfully, wilfully and knowingly and with intent to defraud the revenue of the United States, smuggle, and clandestinely introduce into the United States, certain merchandise, to wit, distilled spirits, which said merchandise was then and there subject to duty, without invoicing the same and without paying duty thereon as required by law.

And it was further a part of said conspiracy that Pierre LeVeque alias Durant, alias Durand alias George Woodrow, Frank Carmine Nardone alias Frank Carmine, two of the defendants herein, and Nathan W. Hoffman, not a de-

fendant herein, and divers other persons to the grand jurors unknown, would finance the purchase of alcohol and other spirits in foreign countries and would then facilitate its introduction into the United States, contrary to law.

[fol. 8] And it was further a part of said conspiracy that the said Harry Ducos and James Bellman, not defendants herein, would cause to be placed aboard the British Oil screw "Isabelle H" at St. Pierre, Miquelon, the said alcohol so purchased and would then cause the said "Isabelle H" to proceed on the high seas in a southerly direction off the Coast of the United States.

And it was further a part of said conspiracy that the said defendants, Pierre LeVeque alias Durant, alias Durand, alias George Woodrow, Frank Carmine Nardone alias Frank Carmine, and Robert Gottfried alias Robert Godfrey alias Robbie, would procure a small vessel and arrange for the trans-shipment of said alcohol at divers points on the high seas to such small vessels for the purpose and with the intent of introducing the same into the United States, contrary to law.

And it was further a part of said conspiracy that Austin L. Callahan and Hugh Brown, two of the defendants herein, would operate a vessel for the purpose of receiving said alcohol at divers points on the high seas from the large vessel "Isabelle H" and introduce the same into the United States, contrary to law.

Overt Acts

1. In pursuance of said conspiracy and to effect the objects thereof, on or about the 17th day of March, 1936, at the Southern District of New York and within the jurisdiction of this Court, Austin L. Callahan, one of the defendants herein, did appear in the vicinity of Pier 5, East River, New York City.

[fol. 9] 2. And further in pursuance of said conspiracy and to effect the objects thereof, on or about the 17th day of March, 1936, at the Southern District of New York and within the jurisdiction of this Court, Robert Gottfried alias Robert Godfrey alias Robbie, one of the defendants herein, did have a conversation with one Conrad Mathiasen.

3. And further in pursuance of said conspiracy and to effect the objects thereof, on or about the 10th day of Febru-

ary, 1936, at the Southern District of New York and within the jurisdiction of this Court, Pierre LeVeque alias Durant, alias Durand alias George Woodrow, one of the defendants herein, did make a long distance telephone call to Wildwood, New Jersey.

4. And further in pursuance of said conspiracy and to effect the objects thereof, on or about the 12th day of February, 1936, at the Southern District of New York and within the jurisdiction of this Court, Frank Carmine Nardone alias Frank Carmine and Pierre LeVeque alias Durant, alias Durand alias George Woodrow, two of the defendants herein, did appear in the vicinity of a restaurant located at 324 West 46th Street, New York City.

5. And further in pursuance of said conspiracy and to effect the objects thereof, on or about the 2nd day of March, 1936, at the Southern District of New York, and within the jurisdiction of this Court, Pierre LeVeque alias Durant, alias Durand alias George Woodrow, one of the defendants herein, did make a long distance telephone call to Montauk, Long Island, New York.

[fol. 10] 6. And further in pursuance of said conspiracy and to effect the objects thereof, on or about the 17th day of March, 1936, at the Southern District of New York and within the jurisdiction of this Court, Austin L. Callahan and Robert Gottfried alias Robert Godfrey alias Robbie, two of the defendants herein, did have a conversation.

7. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 17th day of March, 1936, Hugh Brown, one of the defendants herein, did cause to be docked in the vicinity of Pier 72, North River, a certain vessel known as the "Southern Sword."

8. And further in pursuance of said conspiracy and to effect the objects thereof on or about the 20th day of March, 1936, at the Southern District of New York and within the jurisdiction of this Court, Robert Gottfried alias Robert Godfrey alias Robbie, one of the defendants herein, did meet Pierre LeVeque alias Durant, alias Durand alias George Woodrow and Frank Carmine Nardone alias Frank

Carmine, *in the vicinity of 324 West 46 Street, New York, N. Y.*

Against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (U. S. C. Title 18, Sec. 88).

Lamar Hardy, United States Attorney.

[fol. 11] In United States District Court, Southern District of New York

C 98-300

United States of America

vs.

Pierre Le Veque, Alias Durant, alias Durand, alias George Woodrow; Frank Carmine Nardone, Alias Frank Carmine, Austin L. Callahan, Hugh Brown and Robert Gottfried, Alias Robert Godfrey, alias Robbie

Bill of Exceptions

Before Hon. Grover M. Moscowitz, District Judge

New York, December 16, 1936, 10:30 A. M.

Appearances

Lamar Hardy, Esq., United States Attorney, for the Government; Lester C. Dunigan, Esq., Assistant U. S. Attorney, and Maxwell S. McKnight, Esq., Special Assistant to the U. S. Attorney, of counsel.

Thomas O'Rourke Gallagher, Esq., attorney for defendant Nardone.

Louis Halle, Esq., attorney for defendants LeVeque and Gottfried.

Joseph P. Nolan, Esq., and Daniel E. O'Keefe, Esq., attorneys for defendants Callahan and Brown.

[fol. 12] (The following occurred at the bench):

Colloquy

Mr. Halle: The defendant Pierre LeVeque is withdrawing his plea of not guilty and is going to plead guilty. You

are withdrawing your plea of not guilty and plead guilty?

Defendant LeVeque: Yes.

Mr. Dunigan: With respect to the defendant Pierre LeVeque, may sentence be adjourned until the conclusion of the trial?

The Court: Yes. I am not doing anything on that now.

Mr. Gallagher: I have a preliminary matter which I wish to call to the attention of the Court. I was retained in this case in the early part of November. There were matters pending at the time and immediately thereafter, as soon as I could conveniently do so, I made application for a bill of particulars. Later on a motion was made for the bill of particulars and brought on before Judge Bondy, and he made various suggestions and as a result of those suggestions another motion was made and the first withdrawn, the motion returnable December 7th. I contended then and I contend now that the defendant can not safely go to trial in this case without a bill of particulars, and I cannot go on, on the particulars that were served.

The Court: How long have you been in the case?

Mr. Gallagher: Since, I believe, the middle of November of this year.

The Court: When was your motion returnable?

Mr. Gallagher: The motion was returnable December 7th. I made a motion in due time.

[fol. 13] The Court: Has it been disposed of?

Mr. Gallagher: It has been disposed of.

The Court: Was the motion granted?

Mr. Gallagher: Yes.

The Court: Within what time was the bill to be filed?

Mr. Gallagher: The bill was to be filed forthwith.

The Court: Was it filed?

Mr. Gallagher: Yes, yesterday. I want to acquaint the Court of my attitude. I made application for the filing of certain information on nineteen specific items so I could be prepared to go to trial. Within this date in the bill the Government consented to two items and the Court granted one more, making three. If I had had the time and opportunity I would have been prepared to take an appeal from the denial of the other sixteen items. I know it is within the discretion of the Court. It is a question as to whether or not the Court should have used his discretion on the other sixteen items. On the other sixteen items and

as to count two of the indictment I received absolutely not one scintilla of information.

The Court: Does the information comply with the order?

Mr. Gallagher: The information complies with the order. The order was granted. There was no formal order granted. "Decision rendered," and endorsed on the back of the paper. Forthwith Mr. Dunigan did supply me with a bill of particulars in accordance with it.

The second count charges possession. If so, when, how, what and so forth. I have not received one word on that. [fol. 14] There is a charge in the indictment that we financed this matter and paid moneys. If so, when, where, to whom paid and how?

The Court: Is that the second count?

Mr. Gallagher: No, the first count. The first count charges that.

The Court: Let me have the indictment.

Mr. Gallagher: May I offer to your Honor the application for the bill, the determination, and the bill that I was served with (handing).

The Court: It says, "On or about the 17th day of March." Isn't that close enough for you? That is the second count I am talking about.

Mr. Gallagher: Yes.

The Court: "On or about the 17th day of March in this district." It gives you the quantity, doesn't it, 9,600 gallons of alcohol? What other information do you want on that?

Mr. Gallagher: Where did we receive it, where did we conceal it, where did we contact it?

The Court: Well, of course, in these concealment cases—you take a concealment in bankruptcy, when you charge the concealment of something you do not have to say how the defendant concealed it. Is that your point?

Mr. Gallagher: They say we possessed, knowing the same to be smuggled, and concealed the same.

The Court: On or about the 17th of March in this district you possessed, concealed, and so on, 9,600 gallons. That is pretty accurate as to the amount of gallons. What other information do you want?

Mr. Gallagher: There are five operations there. Did we [fol. 15] obtain same from a boat, conceal same in a warehouse, or take same any place at all? If they so allege, we want to know it.

The Court: Have you any authority for that position?

Mr. Gallagher: The authority I have is that I want to be prepared.

The Court: Your motion has been denied by one of the Judges.

Mr. Gallagher: My point is that we should take an appeal. You cannot very well reverse another Judge's order, but I know it could be done upon the record, the denial of my application for a bill of particulars, my application for nineteen specific items. Only three items were granted.

The Court: I have got the second count. You have the date. Your only point is that you should be told where in this district the defendants concealed?

Mr. Gallagher: I want to know principally whether or not the Government is seriously contending as to the second count——

The Court: Come up here. What about this second count?

Mr. Dunigan: In answer we allege that the Government is not prepared to say where it was concealed, when and how it was taken off the boat and disposed of somewhere. We do not know. That information is in their possession.

The Court: Can you give them that?

Mr. Dunigan: I do not know where they took it to.

Mr. Gallagher: I do not know. I want to limit the issue so I will know what to meet. If he says that he does not know and cannot prove it was concealed——

[fol. 16] The Court: He says he cannot prove where it was concealed. It was taken off the boat within the district here?

Mr. Dunigan: Yes.

The Court: Taken off a boat. That would be on the water. Where was it?

Mr. Dunigan: Pier 72; North River.

The Court: What else?

Mr. Gallagher: In the second count the Government says the boat docked at Pier 72 and unloaded a quantity, and I do not know any more than that.

The Court: Yes.

Mr. Gallagher: That disposes of the second count. I do not know how they are going to prove possession, if they claim it.

The Court: We will take that up later.

Mr. Gallagher: The first count says we financed this with certain money. We want to know, if we financed it, to whom we paid the money, where was it, how we paid the money, money order, check, cash or what manner.

The Court: They do not have to prove that. They have got to prove you smuggled it in without paying duty. That first count is smuggling.

Mr. Gallagher: On the smuggling, all right. If it was smuggled at Pier 72——

The Court: Without paying the duty. That is the crime.

Mr. Gallagher: As to the third count——

The Court: What is that third count?

Mr. Dunigan: Conspiracy.

Mr. Gallagher: The first part of the third count is that we smuggled in and the second part of that third count says further that these defendants——

[fol. 17] The Court: What page?

Mr. Dunigan: Page 4.

Mr. Gallagher: Page 4, "Would finance the purchase of alcohol and other spirits in foreign countries." In what manner was this particular defendant whom I represent, to finance money? If he was to pay any money, to whom in the foreign country, what money was paid and how was it paid?

The Court: What do you say about that?

Mr. Dunigan: I do not think I am required to give that. I would be giving the defendant my evidence.

The Court: You have gone pretty far in this demand. You are not entitled to that.

Mr. Gallagher: All this is evidence that is going to be proven upon the trial. There is no harm in the Government giving it to us so we will be in a position to know what to meet.

The Court: That is in the general conspiracy count. You are not entitled to that. What is the next thing?

Mr. Gallagher: That we got it on the high seas, when there was a transfer.

Mr. Dunigan: I gave you the position of the Southern Sword, near the Winter Quarter Lightship.

The Court: Have you covered everything now?

Mr. Gallagher: In open court Mr. Dunigan had stated when I renewed my motion, that he was going to limit his proof as far as the particulars are concerned, to the con-

tact by the Southern Sword with the steamship Isabelle H. on the high seas. Where was that?

Mr. Dunigan: I said in my bill approximately five or six miles off Winter Quarter Lightship. That is off the coast [fol. 18] of Virginia and Maryland.

Mr. Gallagher: Also that the Isabelle H. had contacted the Pronto. Was that the same place or a different place?

Mr. Dunigan: I was not called upon to give that. I am not stating that. I do not know the point where they contacted.

Mr. Gallagher: We want to know whether that was in jurisdictional waters.

The Court: The charge here is smuggling and the concealment after smuggling, as I understand it. As to the conspiracy, and what happened, they have gone into that very fully.

Mr. Gallagher: I have been persistently and consistently contending in this case that I desire that information in order to prepare for trial. Moreover, as to the conspiracy, I thought it was understood to limit the Government as to its proof, so I will know what it is.

The Court: They say that the defendants then and there entered into a conspiracy to smuggle into the United States liquor, for value, and when it was smuggled in it was concealed. What other information should they give?

Mr. Gallagher: They stated that the conspiracy started October 15, and continued up to the date of the indictment.

The Court: Yes.

Mr. Gallagher: And they state that they financed or would finance the purchase in foreign countries and facilitate its introduction, contrary to law. They should limit the proof. So that acts in October are practically out. The financing is practically out; in foreign countries is practically out. But they are still in because we have not re- [fol. 19] ceived information one way or the other. The only information we have received——

The Court: Why do you say they are out?

Mr. Gallagher: They have not been touched upon. I have received no information as to whether there was any purchase in a foreign country.

Mr. Dunigan: If you will look at the demands he made, he is clearly seeking the Government's evidence. We walked in and granted two requests and Judge Bondy included with

those two one more concession. He has had notice of everything except the one.

The Court: I think you can get along now. I think you are all right. We will impanel the jury.

Mr. Gallagher: May I submit these copies (handing)?

The Court: Yes.

(A jury and two alternates duly impaneled and sworn.)

The Court: You may open.

Mr. Gallagher: There are some preliminary motions that I would like to bring to the Court's attention before the opening. I would like to suggest, if you deem it advisable, to excuse the jury.

The Court: No, come up here.

(The following took place out of the hearing of the jury:)

Mr. Gallagher: I ask leave to be permitted to withdraw the plea of not guilty heretofore entered by Nardone, so I [fol. 20] may demur to the indictment. There was not any special motion made at the time. Judge Bondy told the attorneys that we could withdraw the plea and demur.

The Court: Not during the trial.

Mr. Gallagher: Before the trial.

The Court: The trial is on. It is too late.

MOTION TO QUASH

Mr. Gallagher: I move to quash the indictment on the ground that it was obtained on illegal evidence, in violation of the Fourth and Fifth Amendments to the Constitution. I think your Honor should hear testimony preliminary to the trial and pass upon this evidence. I do not think it is legal evidence.

The Court: The search was illegal?

Mr. Gallagher: I might explain it in this way—it is a peculiar situation—the Government claims that they tapped wires and heard voices. They heard talks, but as far as the identity is concerned as to the conspiracy they went to South Carolina and indicted a voice known as "Frank."

The Court: My question is this: You make a motion upon the ground of illegal search and seizure?

Mr. Gallagher: No, an illegal invasion of the rights of this defendant.

The Court: Did you make a motion in that respect?

Mr. Gallagher: Not yet.

The Court: You have not heretofore? How about that?

Mr. Gallagher: There was a formal proceeding which went up to the Circuit Court of Appeals.

[fol. 21] The Court: Why didn't you make the motion in an orderly way? Why has it not been made before?

Mr. Gallagher: The reason it has not been made before, the removal proceedings to South Carolina were being fought off and on until the 17th, and the warrant was issued for removal. It went before the Commissioner, who decided against them.

The Court: When was the indictment filed here?

Mr. Gallagher: In June.

The Court: They knew about it then?

Mr. Gallagher: Yes, June.

The Court: I will hear it on the trial, whether or not there was an invasion of the defendants' rights.

Mr. Halle: On behalf of Gottfried, I am not making a motion now. I am reserving my rights. Personally I do not know what evidence there was before the Grand Jury but if it should develop that the evidence was obtained illegally, I am reserving my right to make that objection.

The Court: That is what you are stating?

Mr. Halle: That is what I am stating, yes.

The Court: My point is that I will [illegible] question as to anything illegal.

Mr. Nolan: May I make the same reservation with respect to the defendants Brown and Callahan?

The Court: Yes.

Mr. Gallagher: I do not know whether I can assume here to move to quash. The practice is not the same as in the State Court. I am not so familiar with it. The third [fol. 22] count, the conspiracy count, I move to quash on the specific ground that it fails to charge a crime in the manner provided by statute. Analyzing the same I wish to point out to the Court that the third count starts off with an allegation, a charge, of conspiracy. Commonly what it states is very broad. The conspiracy alleges various acts, simply with the conclusion at the end of each paragraph that they were contrary to law. Then follow the overt acts and it says: Against the peace of the United States and their dignity, and contrary to the form of the statute

of the United States in such case made and provided; and refers to U. S. C., Title 18, Section 88. In other words, that is the count and the charge, that they committed a crime by violating Title 18, Section 88. I know personally that it has been the common custom for the Court to recognize that whatever the United States Attorney says is the conspiracy statute. That is not correct. That is not accurate. That is not the conspiracy statute. That is not the crime statute.

The Court: Which is not the crime statute?

Mr. Gallagher: Title 18, Section 88.

The Court: Smuggling?

Mr. Gallagher: The conspiracy section. That is called the "conspiracy section." If you will bear with me just a second, I have in my mind two sections. If I remember correctly, Section 88 is the penalty section. I want to explain that to the Court because I think it is a possible variance to the title as defined in Section 88. It does not state the crime statute.

The Court: I will deny the motion for the present. When you get your sections and the authorities, I will be glad to [fol. 23] look them over.

Mr. Gallagher: 88 provides a penalty.

Mr. Nolan: May the same motion be reserved for Brown and Callahan?

The Court: Yes. Why not let it be stipulated, unless otherwise stated, that a motion or objection made by one defendant shall apply to all.

Mr. Gallagher: Before Mr. Dunigan opens, I request that all witnesses be excluded from the room.

The Court: Why?

Mr. Gallagher: I do not want them instructed. It is not a question of Mr. Dunigan, but some of them may have ideas and gain further ideas after hearing those.

The Court: Have you any evidence of that?

Mr. Gallagher: No.

The Court: Motion denied.

Mr. Gallagher: Exception.

Mr. Nolan: I make the same motion.

The Court: You don't have to. The stipulation covers everything.

OPENING ON BEHALF OF GOVERNMENT

(Mr. Dunigan opened the case to the jury on behalf of the Government, as follows:)

Mr. Dunigan: May it please the Court and gentlemen of the jury: This indictment has been explained by his Honor, the Judge, and charges, briefly, these five defendants Pierre LeVeque, Frank Carmine Nardone, Austin L. Callahan, Hugh Brown and Robert Gottfried, with smuggling into the United States in the Southern District of New York, approximately 9,600 gallons of alcohol. Only four of the defendants are now on trial. It charges these five men with receiving and concealing approximately 9,600 [fol. 24] gallons of alcohol. It charges these five defendants also with conspiring to violate the provisions of the Tariff Act of 1930, and the Anti-Smuggling Act of 1934.

The testimony which the Government will rely upon during the course of this trial to substantiate those charges I will outline briefly to you as follows: We charge first that a steamer known as the Reidun, which is a Norwegian boat, came somewhere off the coast of Newfoundland or Halifax, Nova Scotia, approximately 560 miles from the nearest point of the United States. We will observe the movements of that boat, the testimony by members of the Coast Guard to the effect that they observed its actions. Their testimony will show that this boat was visited from time to time by smaller boats, the names of which will appear more definitely during the trial. The guardsmen observed these small boats in conjunction with the activities of the larger boat, the Reidun. They were able to know that these smaller boats took off a cargo, and they were able to see the type of cargo, the cases, that were taken off.

Of course, these contacts were made, and we expect to be able to introduce this into evidence for your consideration.

One of these boats was a boat known as the Isabelle H. We will show that the Isabelle H made contact with the Reidun and received a cargo. Just where that cargo went to we are not prepared to say, but we will show you this: That in December of 1935, last year, the Isabelle H went into the harbor at St. Pierre Miquelon, up near Halifax, and there took on a cargo of 2,400 cases of alcohol. Prior [fol. 25] to that time another boat named the Pronto had

gotten into some sort of altercation with the Coast Guard off Montauk Point and a collision ensued, the net result of which was that the Coast Guard towed the Pronto into New London, Connecticut. The Pronto had on board at the time of the collision approximately 800 cases. It was a full load of 800 cases of alcohol. During the towing in approximately 400 of those cases were washed overboard and it landed in New London with 400 cases on board. These 400 cases were seized but the ship was not seized. It came into port under distress.

The Pronto, as a result of this collision, needed to be restored and needed to be repaired. We are going to show you that over in New York during this period which I have been talking about, this defendant Pierre LeVeque, and the man whom we charge in the indictment as a co-conspirator, but not indicted, one Burt Erickson, were operating out of a group of pay station telephones in the Astor Hotel in New York. It so happens that Erickson and LeVeque, accompanied by the defendant Nardone and others, one Red Saunders, whom we allege to be a co-conspirator but not indicted, one Nat Hoffman, one James Bellman and one Harry Ducos, who are named as co-conspirators, and also William Kleb, collected around the Astor Hotel during this period, receiving telephone calls from these pay stations and making telephone calls at the Astor Hotel. There is also a substation of the Western Union there. We will show you that during the period of time that the Pronto was being repaired in New London, Connecticut, [fol. 26] by the East Coast Shipyard Company, LeVeque and Erickson from time to time sent Western Union money orders to certain persons in New London, representing payment for the repairs and the raising of the Pronto.

The Isabelle H, so far as we know, was up around Halifax and Yarmouth. We will show you that the Pronto was repaired and subsequently went into that transaction itself. The Isabelle H met with some engine trouble up in Halifax and needed repairs. We will show that LeVeque and Erickson also sent Western Union money orders to Harry Ducos in Halifax and Yarmouth, Nova Scotia, $7,500 and $2,300. The total of these money orders was approximately $31,000.

We will show you also that in the City of New York telephone calls made over the Hotel Astor pay stations which were intercepted by Government officials, one of them to a firm in New York known as the Atlas Diesel Engine Corporation, where certain repairs and certain parts of machinery were ordered. They sent a bill to the Isabelle H.

The Isabelle H, after she took on this cargo of 2,400 cases, moved out from St. Pierre Miquelon, and the Government will show it laid off Seal Island for approximately two weeks waiting for the Pronto. The Isabelle H subsequently contacted the Pronto and they proceeded south off the coast of the United States, the Isabelle H loaded with 2,400 cases, the Pronto empty and being towed by the Isabelle H. Somewhere off the coast of South Carolina or in that vicinity the Isabelle H and the Pronto stopped. [fol. 27] 800 cases of the 2,400 cases were put on the Pronto, and the Pronto then proceeded along the coast of South Carolina and was seized by the Coast Guard with 800 cases aboard and its crew deserted. The Isabelle H learned of the seizure of the Pronto and continued south and they finally found her in the port of St. Georges, Bermuda, where it stayed for some time. It was during the latter part of January. It was some time in the latter part of January when it stopped in St. Georges, Bermuda, still with 1,600 cases aboard. It remained there until some time in March when it successfully eluded the Coast Guard and made its escape.

During the time that the Isabelle H was in St. Georges, Bermuda, with Harry Ducos as chief officer and one James Bellman as an officer, we will show you that about $2,300 worth of money orders were sent out by LeVeque and Erickson to Harry Ducos at St. Georges, Bermuda.

Going back for a moment to the time of the seizure of the Pronto and the Isabelle H going into St. Georges, Bermuda, we have activities in New York with respect to these particular transactions. We find Mr. LeVeque calling over the telephone to Mr. Stenfeld at Montauk Point, Long Island, trying to negotiate for the services of a boat. We find him also talking to Mr. Cooper in Wildwood, New Jersey. We will show that he went to New Jersey accompanied by the defendant Nardone. On that occasion they talked to Mr. Cooper.

The Court: I do not think you better go into too much detail. Just outline it.

Mr. Dunigan: Yes, your Honor. On that occasion they [fol. 28] talked to Mr. Cooper, but were unsuccessful in obtaining a boat. About this time the boat known as the Southern Sword, which was a coastwise vessel operating along the coast of the United States, we place it down in Newport News or Norfolk—I am not sure where we first placed it.

We will show you that the record owner of the Southern Sword is what is known as the Alco Steamship Company, of which the defendant Callahan was the president. At Norfolk where the Southern Sword was loaded with coal, the defendant Callahan put in his appearance, removed his regular captain and instructed it to proceed back to New York, and struck out again. He put in the place of the regular captain the defendant Hugh Brown as the captain of the Southern Sword. The boat was loaded with coal and proceeded on its regular run and reach Bridgeport, Connecticut. Somewhere in the vicinity of the Winter Quarter Lightship, which is off the coast of Virginia and Maryland, the Southern Sword made contact with the Isabelle H coming back from Bermuda and received from the Isabelle H the remaining 1,600 cases of alcohol. The Southern Sword then proceeded to New York and was met at a point near Governor's Island, near the Statue of Liberty, by a tugboat, and on the 17th of March of this year the defendant Callahan went on board. He talked to some one or two members of the crew on board the Southern Sword, after which the Southern Sword docked at Pier 72, North River, and discharged the 1,600 cases.

The testimony will show that the watchman at that pier [fol. 29] was held up and became a prisoner during this period of unloading.

Going back for just a moment, and I will be finished, we will show you certain telephone calls and certain visits and conversations were had by the defendant Gottfried with respect to the Southern Sword and Mr. Callahan. The Government had the wires at the Hotel Astor tapped and the wires at a restaurant on West 46th Street known as the Belford Restaurant, tapped. The testimony will show that these defendants and the others whom I have named and

call the co-conspirators, and who are so described in the indictment, frequented this place and they were all seen there together. We will show that from time to time Nardone, Hoffman, LeVeque, Erickson, Saunders and others, were discussing this proposition to smuggle in liquor and discussing the payments and finances.

That, gentlemen, is the picture which we will present for your consideration. It will appear more readily with reference to specific times and dates from the testimony of the several witnesses.

The Court: Do you gentlemen want to open?

Mr. Gallagher: We reserve our opening until the close of the Government's case.

The Court: Very well.

GEORGE F. HAUSER, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan:

I am an electrician and a member of the Coast Guard since 1928. In the fall of last year, in November or Decem- [fol. 30] ber, I observed the movement of a certain vessel off the coast of Newfoundland, the steamship Reidun.

Mr. Nolan: In order not to be objecting to each specific question on behalf of defendants Brown and Callahan, may I now enter a general objection to any testimony as to either the Pronto or Reidun or any evidence sought to be elicited on the part of the Government as to Brown and Callahan with respect to the Southern Sword and the supposed entry of alcohol into the Port of New York.

The Court: I will take it subject to a motion to strike out if not connected.

Mr. Nolan: May I have a general exception to that extent.

The Court: Yes.

Mr. Gallagher: Will you rule as to the defendant Nardone?

The Court: I have made a statement on the record that will protect every defendant.

(Witness continuing:) When we picked her up at sea we took our position and trailed her for possibly two days, I would say. The commanding officer and the other officers abroad, approximately sixty or seventy men in the crew. I could not say whether Mr. Giffin was on the boat. She stopped and drifted. And these other small boats made their appearance at various times during the course of the two or three days. Then during that time we remained there and observed what was going on. While lying to, these other boats would come alongside the Reidun. They would receive a cargo from the Reidun, consisting of boxes. [fol. 31] I would say about this long (indicating), approximately 20 inches, I would say. About ten or eleven inches wide, and I would say 12 or 13 inches high. We were within 100 feet, I would say. We lay to while these different boats were loading. Of course they all made their departure, made their departure, of course, for New York. They came out on the lee side of her. That is the calm side of the ship. If the sea is running along the boat, you make contact on the calm or lee side, the side opposite from the direction the wind is coming from. They came up on the lee side. You get a very distinct odor of alcohol, alcoholic odors during the times when these transfers of cargoes were being effected. On November 10th we were trailing the Reidun and on November 11th these small boats were making contact with the Reidun. The first one I remember was the Alpaca. And then the Isabelle H contacted the Reidun.

Mr. Dunigan: Mark these.

The Court: Mark them 1, 2, 3 and 4 for identification.

(Marked Government's Exhibits 1, 2, 3 and 4 for identification.)

Government's Exhibit 1 for identification shows the steamship Reidun with the Isabelle H alongside and the Coast Guard cutter passing there. No. 2, that is the steamship Reidun, on November 10, 1935. This No. 3, that is the steamship Reidun with the Isabelle H alongside. That was November 11th, 1935. No. 4, is the steamship Reidun with the Alpaca alongside and the Isabelle H standing off at a distance, and two Coast Guard boats, Argo and Dyone.

[fol. 32] Mr. Dunigan: I offer them in evidence.

Mr. Halle: You are taking them subject to connection?

The Court: Yes, subject to connection, all of these.

(Government's Exhibits 1, 2, 3 and 4 for identification received in evidence.)

Cross-examination.

By Mr. Gallagher:

I have a memorandum here. I prepared this at the time these pictures were submitted to the Government and sworn to by the notary public. This was along in December, 1935, after these pictures were made. I used that memorandum today to refresh your recollection. I testified from them; the whole case. That memorandum was made on board ship, at the time the pictures were prepared, to go to the Coast Guard headquarters for future reference. I stated on my examination today that I did smell an odor of alcohol and that the wind was blowing in my direction, and that it came generally from the steamship Reidun. That direction there. I do not know whether it was the Reidun. There were small boats alongside. There were several there during the course of the time that we were there.

By the Court:

The boat alongside the Reidun would be between the Reidun and us. The ship that I was on, that would be between. It would be impossible for me to say which it came from.

Cross-examination.

By Mr. Nolan:

The Reidun drifted. Our engines were going at the time. [fol. 33] Preparatory to answering the bell or command from the bridge we tried to stay on the lee side as much as possible. We passed by them, possibly got by and we lay to or drifted a little and steamed around and came up in position again. The length of the Reidun was within the vicinity of 75 feet, 75 to 80 feet long, and the beam was approximately 30 feet. Our Coast Guard vessel was the Pontchartrain. Her beam was 250 feet. It was about three times the size of the Reidun. Our Pontchartrain was a steam electric boat. I do not recall just offhand, approximately forty some feet. A regular log was kept on the

bridge. I had nothing to do with that. These records as to the Reidun and these others should be in that log. I testified this morning on cross-examination that the Reidun was approximately 75 feet long and 30 feet wide. I meant the Isabelle H. My answer now as to the length and the width or beam, whichever you call it, of the Reidun. To the best of my recollection, the Reidun, I would say, was 325 or 330 feet long. The width, approximately thirty feet.

Recross-examination.

By Mr. Nolan:

When I was going out during—before I left the court room I overheard someone say there must be some misrepresentation of the Dyone—not the Dyone, but the Reidun. It struck my memory then that the question had been asked what was the length of the Reidun and I had given the length of the Isabelle H. My particular job is electrician's mate. Down below in the engineer's department. We were 100 feet away [fol. 34] on a windy day and I smelled alcohol where we were on the leeward side. I observed that from on the top side on my hours off. I was on day work. I worked from eight A. M. to four P. M., but during the course of this time I might be any place on the ship where there is an alcoholic odor. I am on every day, working from eight A. M. to four P. M. Of course I stood to be called at any hour during the night. I know a ship 250 feet long, that was the Pontchartrain. Lying close to the vessel that I now testify was 275 feet to 325 feet long, within one hundred feet. Both ships drift, but they do not lie to. We pass within one hundred feet. Two ships, one 250 feet and one 325 feet, could not lie to on the trough of the sea, within 100 feet of each other. The Pontchartrain could not have done it. We passed within one hundred feet and hove to after passing. I did testify this morning that our vessel was three times the length of the Reidun. My testimony this morning, I said it was approximately 75 feet long and we were 250 feet long. I want to change it so that the Reidun was 250 feet long. The Isabelle H was impressed on my mind.

ALVIN GIFFIN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct-examination.

By Mr. McKnight:

I am a first line junior officer on board the patrol boat Dyone. I have been in the Coast Guard service since July [fol. 35] 14, 1931. Last fall off Newfoundland as watch officer aboard the Dyone, I accompanied, in company with the Pontchartrain and Argo, the Dyone contacted the Reidun and we hove to in the vicinity of the Reidun for one or two days and observed the Reidun unloading a cargo to some of the small boats in the vicinity. We saw at one time, I remember, the Reidun and the Isabelle H, the Isabelle H alongside of the Reidun, and the Reidun transferring cargo to the Isabelle H. She was alongside during the afternoon, part of the afternoon and part of the evening or night. She was receiving case goods which I would say roughly were 30 inches in length, about 12 inches thick. About 2½ feet by 1 foot. After the Isabelle H loaded she got under way and our ship trailed her to Miquelon, Island of St. Pierre, in French waters while we were watching the activities of the Reidun. I cannot tell whether I had the opportunity of smelling any odors. I do not remember. I would say the Reidun is about 300 feet long, had a beam, I would say, of about 45 feet. Government's Exhibits Nos. 1, 2, 3 and 4 in evidence are true and correct representations of the scene at the time. That is my own ship in the background.

Cross-examination.

By Mr. Nolan:

The Dyone is in these pictures (indicating). The Dyone is there to the right (indicating). This is the Dyone there (indicating). The Reidun is, in my opinion, 325 feet long and her beam is about 45 feet, I would guess. The Pontchartrain is not in that picture. Exhibit 4 is in evidence. [fol. 36] The Dyone is 165 feet long. She is a two Diesel. Burns oil. The Pontchartrain burns oil.

Cross-examination.

By Mr. Halle:

I was present when this photograph was taken, Exhibit 4. That was taken on November 11th. It seems that was our position. I was not on that ship. I was on the Dyone. It shows in the picture. I do not know by whom this photograph was taken. I do not know. I do not know what kind of a lens he was using. I could not tell the distance between the boats.

By Mr. Nolan:

All of the records are contained in the log book. I have the log book here. There are two, one the deck log and one the engine room log. The officer running the ship has the ship's log. It is, in fact, like the book of 1935. I haven't got the engine room log. It would show whether it was laying to or moving. Our engine room log would show the movements of our vessel as far as the engine is concerned, and the consumption of oil also. Our deck log is not the engine room log. I did not bring the engine room log with me. That is the special log of the ship. The miles altogether, the miles cruised that time, whether she was on patrol or any other status. *It shows the condition of the sea*, the weather. It is a regular official log used at all times, besides the watches.

[fol. 37] Redirect examination.

By Mr. McKnight:

That log would show the respective movements of the vessel. Shows all the movements of the vessel.

(*Paper marked Government's* Exhibits 5 to 32, inclusive, for identification.)

The Court: *Mark* the log Exhibit 33 for identification.

(Log marked Government's Exhibit 33 for identification.)

Beckwith Jordan, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct-examination.

By Mr. Dunigan:

I am a member of the Coast Guard. I am chief engineer of the U. S. Cutter George W. Campbell. On November 11,

1935, my position was commanding officer of the Coast Guard vessel Argo, the ranking officer. My title is Lieutenant Commander. On November 11, 1935, I had occasion to observe the movements of a vessel known as the Reidun or Rydam. I first saw that vessel approximately 90 miles south of Cape Race, Newfoundland. My command trailed the Reidun throughout the 10th of November, 1935, and up until the time she stopped and drifted in a position approximately one hundred miles southeast of Galentry Head, St. Pierre, at which time my command also stopped and drifted in the im-
[fol. 38] mediate vicinity. About three o'clock on the morning of the 11th of November, 1935, the British oil screw Anna D went alongside of the Reidun. She remained alongside the Reidun for approximately nine hours and departed, having received during that time a cargo of approximately four thousand cases. The next vessel that came alongside was the Alpaca, a British oil screw. She remained, I think, until about three o'clock in the afternoon of the 11th of November, 1935, having taken on board approximately 2,800 cases, and a large number of cases on deck.

The third vessel that came alongside the Reidun, which was about three o'clock on the afternoon of the 11th of March—11th of November, 1935, was the Isabel H, British oil screw. She received on board a quantity of cases passed from the Reidun to the deck of the Isabel H. And this transfer of cargo was in progress when I left the scene. During the time that this transfer of cases was being effected and we were approximately 75 feet on the lee side of the Reidun I smelled an odor of alcohol. I trailed the Alpaca to a position on Sambro Bank, approximately sixty miles southeast of Halifax Light Vessel. I have trailed the Alpaca on other occasions, the Anna D on other occasions, and the Isabel H on five different occasions.

(Shown Government's Exhibit 5 marked for identification.)

To the best of my knowledge that is the Isabel H, the British oil screw.

(Government's Exhibit 5 for identification received in evidence.)

[fol. 39] I know a boat by the name of the Pronto. For the past six years. I saw it in February, 1935, and also saw her in October, 1935. In October I saw it sixty miles southwest of Montauk Point, Long Island, New York.

Cross-examination.

By Mr. Gallagher:

I distinctly remember November 11, 1935. The morning was fair, bright and clear, visibility 10. Along about the latter part of the afternoon it became overcast. The barometer, I believe, went down one or two hundredths on that day. In the vicinity of where I had been throughout the day up until about four o'clock on the afternoon of the 11th of November, the weather was fair. I left the vicinity about four o'clock. There was a moderate swell. Several boats loading from the Reidun did not have any difficulty in loading. They pulled alongside the lee side of the vessel and made fast and loaded without any difficulty. That was about three o'clock in the afternoon. There were light variable airs throughout the day. There would be practically no breeze, a light variable air, but practically no wind stirring, light variable airs. Our boat is an oilburner.

Q. An oil burner of what capacity?
A. What do you mean?

We burn 62 gallons per hour at full speed and approximately 28 gallons at low speed. Our tank capacity on board was 4,900 gallons. In motion it would not create oil fumes and an oil odor around our boat. I know of oil ships that had oil fumes about them but not this particular type of [fol. 40] vessel. I would say that under those conditions that you have described, that I could smell alcohol that day very distinctly. It was that brought to me on a breeze or wind carrying it to me where we were, perhaps . At times it could have been brought to me on a light variable air. I saw several boats contact the Reidun during that period of time and I did smell alcohol. Therefore my conclusion is that it came from the Reidun. Simply a conclusion on that point, worked out by the operation of my mind from the facts that I observed. I was sufficiently close enough to the Reidun to preclude the possibility of it coming from any other vessel.

By Mr. Gallagher:

During the entire period we were close enough; there was no other vessel in contact with her at the time beginning at three in the morning until three o'clock in the afternoon when we left. And then there is another boat that made

contact immediately thereafter and loaded until three o'clock in the afternoon; and then the Isabel H made contact and continued loading up until the time we left, but there was an interval between the time that each boat came alongside the Reidun. I smelled it on several different occasions when I had occasion to go up close to the Reidun and watch its performances. (Government's Exhibit No. 5) I would describe that as a cargo vessel of approximately 98 feet on the water, approximately 100 tons, oil screw. There is a particular classification such as a Seabright dory. I would classify her as a cargo vessel, particularly designed for the trade for which it was engaged. I have been in the [fol. 41] Coast Guard since 1921 and during that period have not seen hundreds, more than hundreds, of vessels which would answer that description just given. That is not the only kind of vessel built that way that I saw in the waters. I have seen a number of vessels somewhat similar to this, but none just like that. That photograph has no name on it that can be distinguished. The last fifteen years I have been doing Coast Guard duty. I have been in the Bering Sea, the West Coast, and Florida, not all the time on the East Coast. Merely patrol duty. And in the fifteen years I never saw another vessel just like that. I mean exactly the same rig as this. I never saw any other vessel that that photograph would look like in fifteen years. In the first place, she has an extremely low freeboard, built close to the water, a low pilot house and large freeing ports, semi-knock at the bow, very short and stubby radio antennae masts. The most outstanding characteristics are her extremely low pilot houses. I do not say that I never saw another vessel that would look like that if it was loaded with cargo so it would be riding low in the water. I have seen a number of vessels, when loaded, in the distance, might look like this vessel. That could not be a photograph of one of those vessels. I am absolutely positive that is a photograph of the Isabel H. I did not take the photograph. The Reidun used soft coal, I believe. During the twelve hours that I had her under observation I did see smoke coming out of the smokestack from time to time a little. You cannot tell from the smoke of a vessel whether it is soft or hard coal. Whether it is under heavy draft or any other draft. [fol. 42] From time to time you would get an odor of coal smoke.

Cross-examination.

By Mr. Nolan:

The wind velocity is shown by scale known as the Beaufort scale. That tells the velocity of the wind in any particular stage. Recorded hourly. There are government records which show the weather conditions at various points along the Atlantic Coast but would not include the particular locality where we were. We get radio reports on board our vessels from various stations in the United States that tell the various conditions of the weather, including the conditions as they existed and as they will exist in the next few hours.

Redirect examination.

By Mr. Dunigan:

We were approximately 100 miles from land when I observed the Reidun. During the time that I had the Reidun under observation and these other vessels that were contacting it, I did not observe or see any cases going from the smaller vessels to the Reidun. It was always from the Reidun to the smaller vessels and that occurred approximately 100 miles from the nearest point of land.

[fol. 43] DANIEL VALLEY, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan:

Q. Mr. Valley, will you speak up? What is your present occupation?

A. Seaman.

Q. How long have you been a seaman?

A. I have been a seaman about thirteen years.

Q. What were you working at in March of this year?

A. Able seaman.

The Court: Able seaman?

The Witness: Yes, sir.

Q. What boat were you on at the time in March of this year?

A. Southern Sword and S. S. Norfolk.

Q. What else? You mentioned what other boat besides the S. S. Norfolk?

A. Southern Sword.

Q. What was the third one?

A. Iroquois.

The Court: What was the other boat?

The Witness: Iroquois.

Q. Who hired you to work on the Southern Sword?

A. The shipping master, in the boarding house.

Q. Do you know Mr. Callahan?

A. I know him very well.

Q. How long have you known Mr. Callahan, the defendant in this case, one of them?

A. Well, I know at the time it may be one year, may be ten months.

The Court: I do not understand it.

Mr. Nolan: I do not understand it, Judge.

[fol. 44] The Court: What language do you talk?

The Witness: Filipino.

The Court: Talk the best you can. Talk up. These gentlemen want to hear you.

(Answer read.)

By the Court:

Q. Is that what you said?

A. Yes.

Q. How long do you know the defendant Callahan?

A. Ten months or one year.

Q. Keep your voice up. Talk to that man over there, that juryman over there. He wants to hear you.

A. All right.

By Mr. Dunigan:

Q. How long were you working on the Southern Sword?

A. Four months.

Q. How long?

A. Four months.

The Court: Four months.

Q. Where did the Southern Sword run to, and what was its route?

A. Yes, sir.

Q. I withdraw that question. What did the Southern Sword carry?

A. Coal.

Q. From what two points?

A. From Newport News.

Q. Newport News to where?

A. To Bridgeport, Connecticut.

The Court: Lead him up to the point you want to get to.

Mr. Nolan: I do not object. If Mr. Dunigan wants to lead him up to a certain point, I have no objection at all. It may be easier for all of us.

Q. On March 16 of this year, was the Southern Sword down at Newport?

A. Yes, sir.

[fol. 45] Q. Where did it go from Newport News?

A. From Newport to Bridgeport, Connecticut.

Q. The Southern Sword.

The Court: Ask leading questions until objection is made. They do not object to leading questions.

Mr. Dunigan: I understand. I am doing the best I can to develop my own evidence in that way.

The Court: The boat went to Connecticut.

Mr. Dunigan: That was the point I was going to come to.

Q. Did the boat stop out at sea after leaving Newport?

A. Yes, sir.

Q. Do you know where it stopped?

A. I know I saw the lighthouse at the time it was stopped.

Q. How long was it after you left Newport?

A. Around fifteen hours.

The Court: Fifteen hours out of Newport.

Q. What time was it on the day or night when she stopped?

A. Nighttime, around eleven o'clock.

Q. What did the Southern Sword do? Did you see any other boat there?

A. Well, I did; looked like a coast guard cutter.

Q. Did you see any boat come up alongside the Southern Sword?

A. It came alongside.
Q. What happened then?
A. He came alongside. Then I took a line. He came alongside the boat.
Q. You mean this boat came alongside?
A. Yes.
[fol. 46] Q. What did you do then?
A. The Coast Guard—threw away a mattress, the cargo inside.

The Court: Threw away the cargo. I do not understand. Let the record indicate he speaks English very poorly.
The Witness: At the time the Coast Guard came alongside.
The Court: What boat was it?
The Witness: Looked like a Coast Guard, but not a Coast Guard.

Q. It looked like a Coast Guard but it was not?
A. No, it was not.

The Court: What was it?
The Witness: And have alcohol——
Mr. Nolan: I ask that that be stricken out.
The Court: I do not know what he said. He said something *about alcohol.*

Q. There was only one boat that came alongside the Southern Sword?
A. Yes.
Q. It was not a Coast Guard boat?
A. No, sir.
Q. What did it look like, do you know?
A. Looked like a Coast Guard.
Q. But it was not a Coast Guard?
A. No.

The Court: How do you know it was not the Coast Guard? Any difference in the way it looked?
The Witness: Yes.
The Court: What was the difference?
The Witness: He got a radio light. It looked like a Coast Guard, but not a Coast Guard.

[fol. 47] Q. Who was in charge of the Southern Sword at the time?
A. Mr. Brown.

Q. Is that Mr. Brown back there, one of the defendants in this case (indicating)?

A. No, sir.

Mr. Nolan: Will you stand up, Mr. Brown?

(A person stands.)

Q. Is that Mr. Brown?

A. That is Mr. Brown.

Q. Did you talk to Mr. Brown after you left Newport News, before you stopped at that place?

A. No.

Q. Did he talk to you?

A. He did not say nothing.

Q. When you stopped and this boat came alongside and you made fast, what happened then? Were there some people on this other boat?

A. Yes, sir; got a lot of people.

Q. Did you see them doing anything?

A. Yes, he take the cargo from that boat.

The Court: Took the cargo from the other boat. What boat?

The Witness: Southern Sword.

Q. What kind of cargo was it that you saw?

A. I saw it.

Q. Can you tell us what it was?

A. Cases.

Q. Cases?

A. Yes, sir.

Q. Can you tell us what the cases looked like? Describe them, if you can.

A. Cases—got two different cases, one lot maybe a foot and a half and one long two feet.

Q. Yes.

A. That is all.

Q. Do you know how many of these cases were put on [fol. 48] the Southern Sword?

A. Why, I heard, was told, about 1,800 cases.

The Court: What is that?

The Witness: 1,800 cases.

The Court: Did you see them? Did you count them?

The Witness: I was talking to Captain Brown.

Q. What did Captain Brown say? Did he say 1,800 cases?

A. Yes, sir.

Mr. Nolan: I suggest he said he did not talk to Captain Brown.

The Court: Did you talk to Captain Brown?

The Witness: No, the captain from another ship. Captain Brown, he asked that captain of the ship how much you got. The captain of the ship tell Captain Brown, "I got 1,800 cases."

The Court: Did you hear him say that?

The Witness: I heard him say that.

Mr. Dunigan: Will you mark this for identification.

(Marked Government's Exhibit 34 for identification.)

Q. Look at this case, Mr. Valley. If you want to, you can come down and look at it. Does that look like one of the cases that you saw on the Southern Sword (indicating)?

A. Like that case.

Mr. Nolan: I did not hear that.

The Court: Like the case.

Q. Did you help put them on?

A. I helped put them on.

[fol. 49] Q. Did you see what was inside the case?

A. Got it in a can, one case got two cans—one case.

Q. Did you see the cans?

A. Yes, sir I see the cans.

Q. Did you smell anything like alcohol?

A. Something like alcohol. There was some alcohol.

Q. Did you get some of it on your clothes?

A. Yes.

Q. How much did you get on your clothes? Were they wet?

A. They were wet, my pants; yes, sir.

Q. You say that you heard Captain Brown ask the captain of the boat how many cases he had?

A. Yes.

The Court: It was between Captain Brown and the captain of the other boat. That is what he says.

Mr. Dunigan: I want to make it clear.

Q. Can you describe this boat? Tell us what it looked like, the one that came up and tied up to the Southern Sword?

A. Looked like a Coast Guard.

Q. Take a look at this picture, referring to Government's Exhibit 5 in evidence, and tell us whether or not that looks like the boat that you saw?

A. Yes, sir; looked like this one.

Mr. Nolan: May I hear the answer?

The Court: Yes.

Mr. Nolan: It looks like it?

The Court: Yes. I do not think there is anything on the picture. Do not look on the back.

Mr. Dunigan: I will see. There is some writing on it.

[fol. 50] The Court: Just look at the front part of the photograph, just at the photograph.

(Photograph handed to jury by Mr. Dunigan.)

By the Court:

Q. You say you tied up the boat?

A. Yes.

Q. Who gave you the order?

A. The chief mate.

Q. Who is the chief mate?

A. I do not know.

Q. What?

A. I do not know.

The Court: Is he in court?

Mr. Dunigan: Step down and see if you can see him.

The Court: Go around and see if you can.

Mr. Dunigan: Go down and see if you can see the man.

The Court: Go down and look around.

(Witness does as requested.)

The Court: Look. Do not talk. Look all around.

The Witness: This gentleman (indicating).

Mr. Dunigan: Point him out.

The Witness: This gentleman (indicating).

The Court: Point him out.

(Witness indicates.)

The Court: What is your name?
The Person Addressed: Fred G. Velez.

By Mr. Dunigan:

Q. How long were you tied up out at sea when the cases were being put on the Southern Sword?
A. About three hours.
Q. How long?
A. Three hours.
[fol. 51] Q. After that did you come on up the coast?
A. Yes.
Q. Where did you go to next? Where was the next point that you stopped?
A. Stopped at New York harbor, Governor's Island.
Q. What?
A. Governor's Island, at Governor's Island.
Q. Did you stop at Governor's Island?
A. Yes, sir.
Q. How long did you stop there?
A. About an hour.
Q. What did you do when you stopped?
A. A tugboat came alongside.
Q. A tugboat came alongside?
A. Along No. 2 hatch.
Q. Was that the next day after you stopped at sea?
A. Yes, sir; the next day.
Q. Was it nighttime?
A. Nighttime.
Q. What time at night, if you remember, was it when you stopped off Governor's Island?
A. I remember around about seven.
Q. Seven o'clock?
A. Seven o'clock.
Q. What happened when you stopped down at Governor's Island and this tugboat came alongside? What did you see then?
A. I saw Mr. Callahan.
Q. This defendant here (indicating)?
A. Came down from the tugboat to the Southern Sword.
Q. Did you see him get off the tugboat?
A. Yes.
Q. And he came on the Southern Sword?
A. Yes.

Q. Did you talk to him on the Southern Sword?
A. He said, "Hello," and I said, "Hello, Mr. Callahan." That is all.
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[fol. 52] Q. What else did you say to Mr. Callahan?
A. I did not say nothing.
Q. Did you see him talk to Captain Brown?
A. No, I did not see him talk with Captain Brown.
Q. How long was he on the Southern Sword?
A. Five minutes.
Q. Five minutes?
A. Yes, sir.
Q. Did you see him go back on the tugboat?
A. He go back to the tugboat.
Q. And the tugboat came back up the harbor?
A. Yes.
Q. After that, what did the Southern Sword do?
A. We go inside the North River.
Q. The North River?
A. Yes.
Q. Did you dock at a pier in the North River?
A. Pier 72 we docked.
Q. What happened then after you docked?
A. We were alongside Pier 72, but I did not see the longshoremen.
Q Did you unload the cases from the boat, from the Southern Sword?
A. Yes, sir.
Q. Did you help unload?
A. I help.

The Court: Unload it where?
The Witness: Alongside the dock.

Q. Were some of the cases still leaking?
A. Yes, sir.
Q. You smelled alcohol then?
A. Yes.
Q. Get it on your clothes that time? Were your clothes wet?
A. That is right.
Q. Did you see any people on the dock at Pier 72?
A. Yes, sir I see people on the dock.

Q. What?
A. I see; yes, sir.

The Court: What time did you get to the dock?
[fol. 53] The Witness: Got to the dock around eleven o'clock.
The Court: In the evening, nighttime?
The Witness: Nighttime.

Q. Do you remember what day of the month that was?
A. No, I do not remember.
Q. Would you say that it was in March of this year?

Mr. Nolan: He says he does not know when it was.
The Court: Which month? What month was it?
The Witness: I do not remember.

Q. Do you remember when you went to work on the Southern Sword? Do you remember what month and what year?
A. I remember 1936.

The Court: How long ago?
The Witness: Ten months.
The Court: About ten months?
The Witness: Yes, sir.

Q. After this ship, when you docked at Pier 72, did you make any other stops with the Southern Sword?
A. No, sir.
Q. After you docked at Pier 72, you went to Bridgeport, didn't you?
A. Yes, sir.
Q. The same night?
A. The same night.
Q. After you got to Bridgeport, did you come back to New York on the Southern Sword?
A. Yes, sir.
Q. Where did you go to then?
A. We dropped anchor outside the harbor.
Q. What is that?
A. We dropped anchor outside Governor's Island.
[fol. 54] Q. And the Southern Sword was seized by the Coast Guard?
A. Yes.
Q. You were on the boat then?
A. Yes.

Q. How long was it when the Southern Sword was seized —how long was that after you unloaded the cases at Pier 72? Two days?

A. No, sir.

Q. How many days, do you think, when you were seized?

The Court: He does not know what "seized" means.

Mr. Nolan: When he was arrested by the Coast Guard.

Q. You were arrested by the Coast Guard on the Southern Sword?

A. Yes.

By the Court:

Q. Do you remember that you were arrested?

A. Yes.

Q. When was that, what month?

A. I do not remember what month.

Q. How long before that did you unload these cases? You were arrested, were you?

A. Yes, sir.

Q. How long before that, how many days before that, did they unload the cases at the dock?

A. About five days.

The Court: About five days.

By Mr. Dunigan:

Q. You went from the dock up to Bridgeport and came back and you were arrested?

A. Yes, sir.

Q. You have not been on the Southern Sword since that time?

A. No, sir.

[fol. 55] Q. You were hauling coal on the Southern Sword from Newport News to Bridgeport?

A. Yes, sir.

Q. Did you ever go up the North River before?

A. Never.

Q. Is this night when you unloaded the cases the first time that the Southern Sword ever went up the North River?

A. That is right, sir.

Q. Can you describe this tug that came down and met the Southern Sword? Did you look at it so you can tell what it dooks like?

A. What?

Q. The tug that came down with Mr. Callahan that you told us about, can you tell us about that tug?

A. A big tug, smokestack got "M."

Q. Had an "M" on the smokestack of the tug?

A. Yes.

By the Court:

Q. Did you know Callahan before that?

A. Yes, sir.

Q. How long had you known him?

A. At the time I was working, that is when I know him.

Q. How long?

A. Ten months.

Q. How long before that did you meet him, when the tug came along and he got off five minutes?

A. Yes, sir.

Q. How long before that did you know him?

A. When I saw him come around in court.

Q. Before that, did you know him? Do you remember when he came on the tug?

A. Yes.

Q. Did you know him before that?

A. Yes.

Q. How long before that did you know him?

A. Around three months.

[fol. 56] By Mr. Dunigan:

Q. You knew him all the time you worked on the Southern Sword?

A. Yes, sir.

Q. When you left Newport News and then went out at sea and took these cases, just before that time who had been the captain of the boat?

A. Mr. Brown.

Q. Before you left Newport News was Captain Pendleton in charge?

A. Captain in charge from Bridgeport, Connecticut?

Q. Bridgeport, Connecticut?

A. Yes.

Q. He was in charge from Bridgeport to Newport News?
A. Yes.

The Court: Who is this?
Mr. Dunigan: Captain Pendleton.

Q. Did you see Captain Pendleton on the boat when you stopped out in the sea and picked up these cases?
A. No, I did not see him.
Q. Did you see him on the boat when you stopped down at Governor's Island?
A. I did not see him.
Q. Captain Brown was in charge at Newport News?
A. That is correct.
Q. Have you seen Mr. Callahan since you were arrested?
A. No, sir.

Mr. Dunigan: That is all.

Cross-examination.

By — Nolan:

Q. How long did you say you worked on the Southern Sword? Talk a little loud so the last man can hear you.

The Court: How long did you work on the Southern Sword?

A. About three months.
[fol. 57] Q. About three months?
A. Yes, sir.
Q. What did you mean by saying you were ten months with it? Did you say ten months?

Mr. Dunigan: He did not say that, your Honor.
The Court: He said ten months ago.
Mr. Dunigan: Ten months ago he had known Callahan.
Mr. Nolan: We could not hear what he was saying. If I do make a mistake, I will be glad to correct it.

Q. You were working three months on the Southern Sword?
A. Yes.
Q. You saw Mr. Callahan this night on board the ship?
A. Yes, sir.

The Court: Louder.

Q. You have not seen him since?
A. What?
Q. You have not seen Mr. Callahan since you were arrested?
A. No, sir.
Q. How long after you were arrested did you remain in the custody of the Government?

The Court: I do not suppose he knows what "custody" means.

Q. Under arrest?
A. For two days in the fort.
Q. That is the jail, I guess.
A. It is a jail, all right.
Q. And they asked you various questions?
A. Asked me questions, but I did not get the questions, either.

The Court: They asked you questions about what?
The Witness: I did not get any question. They talked about the Coast Guard.

[fol. 58] Q. You did not answer?
A. No, sir.
Q. You talked to somebody and told them this story before they put you on the witness stand, that is true, isn't it?
A. No, sir.
Q. You have not talked with anybody yet?
A. No, I did not talk with anybody except the Coast Guard.

The Court: For the Coast Guard?
The Witness: Yes, sir.
The Court: You talked to somebody?
The Witness: Yes.

Q. You talked with the men from the Coast Guard? I am not trying to fool you. I just want to get the facts.

The Court: He says that he did not tell the Coast Guard anything about this case.

Q. Whom did you tell about it before you came into court today?
A. With the gentleman in the corner (indicating).

The Court: Two of them stand up.

Q. All the coast guards?
A. Two of them together.

Mr. Nolan: Let them stand up.
Mr. Dunigan: One is W. E. Dunigan and one is Commander Yarbell of the Coast Guard.

Q. Did you also talk to this other man?
A. No, sir.
Q. You did talk to Mr. Martin?

Mr. Nolan: Will you stand up.

(A person stands.)

[fol. 59] Q. Did you talk to him, too?
A. Yes, he asked me questions.
Q. You did not talk to this man that you looked for in the court room, Valez, that you just picked out?
A. No.
Q. How do you pronounce his name?
A. I do not know his name.

The Court: Stand up, will you, please?

(A person stands.)

The Court: He was the chief mate?
The Witness: Yes.

Q. You had not talked to him?
A. He gave me orders.
Q. Today did you talk to him?
A. Today; no, sir.
Q. Weren't you out in the corridor of the court room, with him out in the hall during the noontime, and talked to Valex when I was there?
A. No, sir.

By the Court:

Q. Did you talk to this man in the hall outside, Valez? See that man?
A. Yes.
Q. Did you talk to him outside in the hall?
A. Just now?
Q. *No*, during the lunch hour.
A. He asked me about the chief engineer.

By Mr. Nolan:

Q. You did have some kind of talk with Valez?

A. No, sir.

Mr. Nolan: I think I can leave that just there.

Q. Will you tell me the exact conversation you say you [fol. 60] heard Captain Brown have with the man on the other boat, after the ship stopped?

A. Yes, sir.

Q. Tell *me just what you heard the other man* say and what did Captain Brown say.

A. Before the ship came alongside, Captain Brown——

Q. I am not asking you that?

A. I will explain it.

Q. I ask you what you heard the men say. Tell me what was said by Captain Brown and what the other man said. You understand me, don't you? Don't you understand?

A. Captain Brown told the captain of another ship, "How many hundred you got?" He got 1,800 cases.

Q. That is all you heard, isn't it?

A. Yes, sir.

Q. That is what I want to know. That is all I am asking you. When the ship came to New York you thought there would be longshoremen?

A. At the time I was alongside the dock they was off. We pulled alongside and no longshoremen around the shore.

Q. There are always longshoremen when you come with a cargo?

A. We did not see anybody on the shore.

Q. When you unload a cargo there are always longshoremen there?

A. I do not know how to speak English myself. Alongside the dock this time was sailors, no longshoremen in line.

Q. You expected longshoremen to be there, didn't you?

A. We pulled alongside an open door and everybody come to take out the whole cargo.

Q. Did you help unload the cargo?

A. I help because I got orders.

Q. On board the Southern Sword were you an able seaman?

A. I was a seaman. The mate, he is poisoned.

[fol. 61] Q. What were your watch hours?

A. Watch hours, eight to twelve.
Q. Both morning and night?
A. Morning and night.
Q. Did you work every day on this boat?
A. I work overtime. That is on account of unloading the cargo.
Q. Did you work overtime in Bridgeport unloading coal?
A. Yes, sir.
Q. In Norfolk in loading coal did you work overtime?
A. I worked overtime.
Q. When did you leave Norfolk?
A. We leave Norfolk eight o'clock in the morning.
Q. You left at eight o'clock in the morning?
A. Eight o'clock in the morning.
Q. What time did you get up to Bridgeport?
A. I do not know.
Q. What time did you get to Bridgeport?
A. Some time about five o'clock. Some time on account of the weather it may be the middle of the night.
Q. On this last voyage when you went to Bridgeport, what time did you get to Bridgeport?
A. I do not remember.
Q. Do you remember what the weather was when you got there?
A. I see plenty of ice.
Q. Daylight?
A. Daylight.
Q. Was it cold weather?
A. Yes, cold weather.
Q. Was it raining?
A. No raining, ice.
Q. Was it clear?
A. Yes, sir. Ice in the river.
Q. Was it snowing?
A. No snowing.
Q. When you left Norfolk, was it raining?
A. No raining, either.
Q. Was it snowing?
A. No snowing.
Q. Was it cold?
A. Got a little cold.
Q. Was there a high wind?
A. No high wind.

Q. When you came out from Bridgeport, how was the [fol. 62] weather coming up the coast? Was it rough weather?

A. No, rain and fog, both.

Q. When this boat came alongside was it raining or foggy or snowing?

A. Alongside of what?

The Court: With the tugboat?

Q. Not the tugboat. When this boat gave you the cargo at sea, when it came *alongside, was it raining* or snowing?

A. You ask me alongside?

Q. This boat came and approached your vessel and talked to Captain Brown, didn't it?

A. Yes, sir.

Q. Was it raining then, or snowing?

A. No snow, no rain, either.

Q. Was it a dark night?

A. Dark night.

Q. Was there any moon?

A. No moon.

Q. Was it foggy?

A. No fog.

Q. It was very clear?

A. Very clear.

Q. When we got into New York, was it raining?

A. No raining.

Q. Was it a dark night?

A. Dark night, yes, sir.

Q. Was it snowing?

A. No snowing.

Q. Was there a high wind?

A. No, high wind, either.

Mr. Nolan: Thank you. You speak excellent English.

Mr. Dunigan: I move to have that remark stricken out and all other similar remarks made by Mr. Nolan.

The Court: We will have no more remarks like that, Mr. Nolan. It is gratuitous and unnecessary. The counsel will desist from that sir. I do not permit it. There will be no colloquy.

Q. Did any of these wooden cases break when you unloaded them?

A. What?

[fol. 63] Q. Did any of these wooden cases break that you saw like this (indicating); did they break when you put them on board the Southern Sword?

A. Yes.

Q. *Did any of them break when you took them off in New York?*

A. Yes, sir.

Q. Who told you to tell that?

A. What?

Q. That they broke?

A. *Because* everybody drop them. That is the way they broke.

Q. Did you drop any?

A. I drop, myself.

Mr. Nolan: That is all.

Redirect examination.

By Mr. Dunigan:

Q. Did you get any extra pay for handling these cases?

A. No, sir.

Q. Did Mr. Callahan pay you your wages at the time you were arrested by the Coast Guard?

A. Yes, sir.

Q. Does he owe you any money now, Mr. Callahan?

A. Thirty-one dollars.

Q. Thirty-one dollars?

A. Yes.

Q. Did you talk to him about that $31 since you were arrested?

A. No, sir.

Q. Did you ask him to pay you the $31?

A. No; sir, I did not ask him.

Mr. Dunnigan: That is all.

By the Court:

Q. You started to say something about before the ship came along you spoke to Captain Brown?

A. Yes.

Q. What did he say to you?

A. Asked Captain Brown how many hundred cases he got.

[fol. 64] Q. Who asked him?

A. Another captain.

Q. Was there anything else? Did Captain Brown say anything to you?

A. No, sir.

Q. Before that?

A. No, sir.

Mr. Dunigan: That is all.

JOHN J. HUMPHREYS, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan:

I am manager of the service department of the Western Union Telegraph Company and familiar with the records of the Western Union Company and with the method of procedure of sending money order telegrams. When a person sends moneys to some other city by means of a Western Union telegram a draft is drawn up and sent out and delivered to the payee. He calls at the office. There is cash for him. In due course that draft pays through the delivery office account back to the office of origin and is matched up with the application, the paper that the sender makes out. Government's Exhibits 6 to 32 inclusive, all marked for identification are records of the Western Union Company.

MICHAEL F. GEIGLE, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. McKnight:

Mr. McKnight: Will you mark these as one exhibit?

[fol. 65] (Marked Government's Exhibit 35 for identification.)

I am with the Postal Telegraph Cable Company, in charge of the records. Government's Exhibit 35 for identification are from our records.

JOHN EVERETT PIKE, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan:

My business is shipyard, with office located at Noank, Connecticut. My concern is engaged in repairing and raising ships, and so forth. I know a boat named the Pronto. I first saw the Pronto approximately August 11, 1935. I saw a part of the superstructure of the vessel, the vessel in a sunken condition, in the New London harbor. I entered into negotiations with respect to the raising of the Pronto.

Q. Who did you talk to in that connection?

Mr. Gallagher: I object, not within the issues and not within the indictment as charged. The date charged in the indictment is October 15th. He is talking about August 11th.

The Court: Is the purpose to show the ship, the connection with something?

Mr. Dunigan: Yes.

The Court: I will take it subject to a motion to strike out if not connected. Go ahead.

[fol. 66] I talked to a certain Captain Conrad with respect to raising the Pronto. To the best of my knowledge he was the skipper or captain.

The Court: What is the name?

The Witness: Conrad, sir.

The Court: Come up here, please.

(Discussion at bench between Court and counsel.)

The Court: Are you going to show that Conrad was hired?

Mr. Dunigan: I am going to show that Conrad was the master of the Pronto; that the Pronto was seized in South Carolina, and that he was in charge of it when seized; I am going to show that some of these defendants now on trial sent money from New York to Mr. Pike to pay for the repair of the Pronto.

Mr. Halle: I happen to know about that. It was under seizure up there. The *Pronto* and the Coast Guard boat

were in collision and the Pronto was in a sinking condition. The boat and the cargo were released. The only reason the cargo was not taken out was because under the tariff laws we had to pay a ton rate on delivery. There was no seizure.

The Court: The purpose of this testimony is to show the connection of certain defendants with the boat.

Mr. Dunigan: Certain defendants on trial now.

The Court: This is off the record.

(Discussion off the record.)

(The following took place in the presence and hearing of the jury):

(Record read.)

[fol. 67] By Mr. Dunigan:

I subsequently raised the Pronto. I was paid for raising the Pronto $300. It covered the raising of the Pronto and landing her on a marine wharf. I did other work on the Pronto besides that that I just enumerated. Consisted of certain pump repairs. I entered into a contract, written which was signed by Captain Conrad, specifying certain work to be done for a certain sum of money. The total sum of money was $1,800. The figure $300 that I already told about was a separate item. That was for the work I did on the Pronto together with some extras. I was paid for this work. Some cash and some Western Union money orders. Certain money came direct to me and certain money I had directed by the Western Union to a friend of mine. Harold Starr. I received the proceeds. I think in each case that Mr. Starr cashed them. Those all came to Mr. Starr and he endorsed the draft and subsequently turned the proceeds over to me. I think I would recognize Mr. Starr's signature. Government's Exhibit 28 for identification is my signature on the back. I did receive that telegram at the place indicated on it. That is my signature on the back of the check. Government's Exhibit 23 for identification I have seen that before. I recognize that as Mr. Starr's handwriting on the back, the endorsement. That also is my endorsement on the back of the draft. Government's Exhibit 24 for identification and 27 I recognize the signature. I could not definitely know if I know a man named Cecil Bears. I know a party named Cecil. There was a Cecil a [fol. 68] member of the crew of the Pronto. The last time I saw the Pronto was approximately October 26th. That

was when it left my place of business. I am not sure of the exact date, approximately that time.

By Mr. Dunigan:

I know a man in connection with the Pronto named Bill. I would not identify the two names or connect them together.

PATRICK L. SHEA, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan:

My business is hotel and restaurant located at New London, Connecticut. Harold Conrad was captain of the boat you have been talking about. I know that is what he told me he was. I have had no business dealings with Captain Conrad of the Pronto outside of collecting board bills. The crew stayed at my hotel at New London. Three had one room with three beds. I think it was October, 1935. I think it was a year earlier. He would notify me there was a check coming for these board bills in the name of the hotel and it would come through Western Union. Conrad told me I would receive this through Western Union. I did thereafter receive money from the Western Union. Government's Exhibits 22 and 30 for identification are the telegrams. Telegram and a check. That is my endorsement on the back of the check. Same testimony with respect to Government's Exhibit 30.

[fol. 69] LEO MURPHY, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan:

I live at Yarmouth, Nova Scotia. I know a man by the name of Harry Ducos. I have known Harry Ducos for a year. I first met him about two years ago. I know a man by the name of James Bellman. I have known him about three years. I first met Harry Ducos in Yarmouth my

home. I know a boat by the name of Isabel H. I worked on the Isabel H. I was working on the Isabel H on or about December, 1935. Captain Ducos employed me to work on that particular boat. That is Harry Ducos. I was in Halifax when I signed on the boat. I signed on December 5, I think, around that. In December of 1935, the Isabel H took a cargo of alcohol at St. Pierre at the time Ducos was in charge of the boat. James Bellman was on board also. He was mate. We took on 2,400 cases at the warehouse in St. Pierre on December 28th and the Isabel H pulled out of St. Pierre. We anchored off English Cove, off St. Pierre, and stayed there for two days, and from there we came to Seal Island. That is off Yarmouth. We stayed at Seal Island three weeks watching for the Pronto.

By the Court:

We delivered them to the Pronto, 800 cases, about January 28th, 28th or 25th, I am not sure.

[fol. 70] By Mr. Dunigan:

We picked up the Pronto after we laid off Seal Island and we came to a point off the Carolinas. The Pronto was empty. We put 800 of the 2400 cases on board the Pronto at the time Harold Conrad was in command of the Pronto. Other members of the crew of the Pronto were Cecil Merz, Pete Romain, Marty Evans. There is two more guys, but I forget their names. Ducos and Bellman were still on board the Isabel H at the time. We had a radio on the Isabel H. We learned that the Pronto had been seized after it took on the 800 cases and the Isabel H with Ducos in command went to St. George, Bermuda. About January 27th or 28th I think that would be the time. It was around the latter part of January or the first of February. After it arrived in Bermuda I went in a hospital. I got my hand injured and went to the hospital. When I left the Isabel H, Ducos and Bellman were still in command and they still had the 1600 cases on board. I saw Ducos and Bellman after I left and went to the hospital in Hamilton. I talked to Ducos in the hospital. He asked the doctor how long I was going to stay there. Ducos told me they may get out most any day, and I should go home, and the doctor would not let me. My hand was hurt, of course. I said if I stayed there I did not know what was going to happen.

(Marked Government's Exhibit 36 for identification.)

[fol. 71] I recognize some of the men's photographs on there. This is Harry Ducos (indicating), and Bill Porier, and this is Woodrow (indicating). His name is Woodrow. I forget his first name. Government's Exhibit 34 for identification, this case, the cases that we loaded on at St. Pierre looked like this and the cases, the 800 cases, we put on the Pronto looked like this. And this is also the type of case that was left on the Isabel H the 1600. Government's Exhibit 5 in evidence looks like the Pronto to me. I am sure it is the Isabel H. I do not know Pierre LeVeque one of the defendants in this case. I heard of him. I heard him talked about. Wireless, Harry Ducos. I asked Harry Ducos what they were going to do about my hand, so I could go to the hospital. He said he had no authority, he told me. I asked him. He said he had to get in touch with Pierre LeVeque and Burt Erickson before he could give me authority, and he never did. I did not have any conversation with Ducos or Bellman with reference to Halifax or as to Yarmouth and about alcohol. Not very—they used to call New York and speak on the phone. Pierre LeVeque called Halifax. I did not hear Ducos call Pierre LeVeque. It is a wireless to Pierre about the Isabel H.

(The following took place in the presence and hearing of the jury:)

I heard Ducos say to LeVeque we lay in Halifax. We have to get out that cargo. We wait for a week. He said he could not get any money to pay the money. They were waiting for LeVeque and Erickson to get the money. It was probably December 11th. We left Halifax December [fol. 72] 24th, 1935. This conversation occurred after I signed up on the Isabel H in Ducos' room. I did not hear Ducos say anything else about Halifax or Erickson, not that I recall. I did hear Ducos one day call Erickson or LeVeque. He said he was calling him. Ducos talked to me and said LeVeque had called him up five o'clock at night. I was present when Ducos was talking over the phone. I was right in the room. They were talking in French. I cannot say what they said. Ducos told me that he was talking to LeVeque. Anything that I have not told you, it has been so long I forget. It has been almost a year. I do know Bill Kleb. He is known as Big Bill. I did see him up around Halifax and Yarmouth. I did see him on board the Isabel H. He was staying on board came on

board, hung around there. I saw him around with Ducos and Bellman. He was not on the Isabel H when we left and came down and towed the Pronto. He stayed ashore. I did not ever talk to Kleb. I did not hear him say anything about LeVeque. Kleb was waiting for money to have the engine fixed up at Yarmouth after we got the cargo on. The Pronto was laid up when we were lying off Seal Island. Kleb was waiting for repairs or money for the Pronto. Then we left and the wireless received some words aboard, and those words must have been after we got off George's Bank. I did not hear Kleb or Ducos or Bellman say where the money for the Pronto was coming from, not at the time, they did not. I do not know Burt Erickson. Not that I saw him. I did hear Ducos talk to Erickson. That is what he [fol. 73] said. He said he could not put me in the hospital and pay the bill until he got authority from LeVeque and Erickson. I did hear Kleb talk to Erickson. He was trying to get advance money to fix the Pronto. Kleb said the money to fix up the Pronto was coming from LeVeque and Erickson. I do not know John Saunders or Big Red Saunders. I did hear Ducos or Kleb talk to Big Red Saunders aboard the Pronto. I guess, once. They said he was on board the Pronto. He was not on board the last trip from South Carolina so far as I know. I do not know George H. Geiger.

EPHRAIM ZOOLE, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan:

I am a lieutenant-commander, commanding officer of the Coast Guard Cutter Yamacraw. I was a commanding officer on the Yamacraw on January 20th of this year. I recall on that date the seizure of the boat known as the Pronto. The Pronto was seized seven and one-half miles off the coast of South Carolina, seven and one-half from low water line of the United States. There were six men aboard. There was the master, Harold Conrad, a man by the name of Wallace, one known as Constant Mike and a man named Romain, Michael Seitz, Siro Martin and Percy Wallace.

The vessel had about 800 cases of grain alcohol aboard. [fol. 74] That alcohol was seized. They were wooden cases, each case containing two tin cans. The capacity of the cans about three gallons apiece.

Q. Look at Government's Exhibit 34 for identification and state whether or not you have seen that case before?

A. (The witness left the witness stand and then returned.) Yes, sir; that case was taken off the Pronto seizure.

There were 800 cases of this type. Generally there were different markings, but in general they were of that type.

They had these wire bands around them. Government's Exhibit 39 for identification is Harold Conrad, the master of the Pronto. On Government's Exhibit 34 for identification, when the Pronto was seized, I placed my signature. I placed *by* signature on that case. I did see my signature just now when I examined the case.

ANN EDELMAN, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan:

I am a telegraph operator for the Western Union Telegraph Company. At the time in question I was at the Astor Hotel. That is in the vicinity of 44th Street and Broadway. I was a relief operator there during the month of December of 1935. I do not know a person by the name of Pierre LeVeque. I do not know a person by the name of Burt Erickson. I remember talking in December, 1935, to Mr. Dunn, an investigator of the Alcohol Tax Unit. Just [fol. 75] a few minutes prior to that conversation I had received a telegram. It might have been a money order; I do not know. A money order application. And Mr. Dunn talked to me about that money order application. When I received the application there were two men present. I recognize Mr. LeVeque right there as one of the two men (indicating), but I did not know him by that name. He was writing the order and he did not give me the money for the order, so therefore I did not know his name. His com-

panion gave me the money. He told me what to write, and I filled out the order. (Witness leaves the witness stand and goes down into the court room and looks at everybody in the court room.) I do not see the other person present who was with LeVeque.

(Marked Government's Exhibits 43, 44 and 45 for identification.)

(Witness looks at Government's Exhibits 43, 44 and 45 for identification to ascertain whether or not that was the man that was with Mr. LeVeque.) Well, I could not judge very well because the man who came to the counter with the money had his hat down over his eyes and he had his collar up and I certainly was not interested at the time to take special notice of him. I do not recall where this money order was sent I would have to refresh my memory; some place in Canada.

Q. Look at Government's Exhibit 14 for identification and see if that refreshes your recollection (handing to witness).

A. Yes, sir.

[fol. 76] The Court: Where to?

Mr. Gallagher: May I interpose and ask her whether it will refresh her recollection? Yes or no would be the proper answer. As to the witness's own conclusion as to where the telegram cable went to, we wish to offer an objection, and I am objecting under the Communications Act, Title 47.

Mr. Dunigan: He should save the question and ask it of the witness.

Mr. Gallagher: That is what his Honor asked.
The Court: I did not.
Mr. Gallagher: I thought you said, "Where to."
The Court: I said, "Is that your recollection."

Q. Is that your recollection?
A. Yes, sir; that is my recollection.
Q. Are you prepared to state where the money was sent to?

Mr. Gallagher: May I ask you to answer yes or no.
The Court: Answer yes or no.
The Witness: What is the question?
The Court: Where it was sent to.

Q. Can you tell now where the money was to be sent?
A. Yes.
Q. Where was it sent?

Mr. Gallagher: I object to her testifying. That is in violation of the Communications Act, Title 47. It was sent through the Western Union Telegraph Company or one of [fol. 77] the telegraph companies. That is in violation of the Communications Act, and the disclosure of a message.

The Court: I will look at the Act. Come up.

(Discussion at bench between Court and counsel.)

The Court: You have got it on the record that once a defendant objects no objection need to be made by the other defendants. It is not necessary. You are fully covered. There is no question about that.

Mr. Halle: May I show you this law decided by the District Court of Appeals in Washington, the last part of the top paragraph here (handing to Court).

The Court: Have you seen this?

Mr. Halle: May I say this, your Honor: I raised this question before the Circuit Court of Appeals in the removal case, and they refused to pass upon it upon the ground that it was not necessary to decide that phase of the case because the identification was made without this evidence.

I want to call your Honor's attention to the Olmstead case. That was the famous case where the Circuit Court of Appeals ruled you may intercept messages (reading):

"The Congress, may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in the Federal Court trials, by direct legislation, and thus depart from the common law of evidence."

[fol. 78] After the Olmstead case was decided this section of the law was enacted. I think this is the very first case. We had the matter before District Judge Clancy. This is the case we had before Judge Clancy. Judge Clancy wrote this opinion (handing to Court). But it is to be noted that the Circuit Court of Appeals in that opinion, it is rather significant that the Circuit Court of Appeals refused to pass upon the question one way or another, stating that it is not necessary to go into that. That is the case, and

the only other case on the subject is the one I handed up to your Honor, the Hearst case. That is what the Circuit Court of Appeals said where they most strikingly said that the District Court of Appeals——

The Court: How important is this?

Mr. Dunigan: Very.

Mr. Halle: It will become very important.

Mr. Dunigan: I think you will see that it was not directed to communications of this kind where it makes sufficient——

The Court: The concluding paragraph? What part?

Mr. Dunigan: Right in here (indicating).

The Court: I do not believe it was the intent of Congress under this section to prevent the use of such evidence, where the telegram was used as an instrument of crime. I think it was the express purpose of Congress that it [illegible] be used. The objection is overruled.

Mr. Nolan: Exception.

[fol. 79] Mr. Halle: The language of the District Court of Appeals is specific.

The Court: That is my ruling. I will look it over. If I come to another conclusion, I will let you know.

Mr. Halle: I would like to go into another argument, if you think you want to hear something further. I have given careful study to the whole statute.

The Court: Otherwise I think Congress would use the express language, where the telephone or telegraph is used as an instrument of crime. I have the language of Congress saying so. I do not think it says that. I will look at it.

Mr. Gallagher: May we have an exception?

The Court: Yes.

Mr. Gallagher: Your Honor overrules the objection and we are permitted to have an exception to the ruling each time?

The Court: Sometimes it means a waiver. I think you ought to except to the ruling. That question has not been decided, as I understand it.

Mr. Gallagher: I do not want to take exception to the Court's——

The Court: You can note an exception to the ruling that I make on these questions, yes.

Mr. Gallagher: Yes.

(The following occurred in the hearing of the jury.)

Q. (Read by stenographer.) What was your answer to that question?

A. I said I do not remember without seeing it.

[fol. 80] The Court: As I have said, it will be taken subject to a motion to strike out if not connected. This ruling has nothing to do with this question. I will have that before me.

Mr. Halle: All this evidence is taken subject to our objection.

The Court: Yes, subject to a motion to strike out if not connected.

Witness: Exhibit 14 for identification—the application is in my writing. It went to Halifax, Nova Scotia, December 19, 1935. Government's Exhibit 6 for identification—I have seen that before. This message was filed on December 16th, 1935. The counter marks are on it in my handwriting. The signature and the word "unsigned" are in my handwriting.

William E. Dunn, Jr., called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan:

I am an investigator of the Alcohol Tax Unit and was such on December 16, 1935. I know the defendant Pierre Le Veque and Burt Erickson.

Q. Do you see Burt Erickson in the court room? Step down.

A. (The witness leaves the witness chair and goes down into the court room and indicates a man.)

The Court: What is your name?

A Voice: Steinfeld.

[fol. 81] The Witness: That is not the party (indicating).

The Court: What is your name?

A Voice: Burt Erickson.

Witness: On December 16, 1935, I saw Pierre Le Veque in the Hotel Astor. I also saw the gentleman I have just

pointed out, Burt Erickson. I saw them first at the rear of the lobby and seated in the lobby, I think, on the 43rd Street side near a brokerage office of Minton & Company and go up to the Western Union substation. I saw Erickson pick up a blank from the desk and walk—I could not see just what it was—at the Western Union office—and walk over back towards the rear of the lobby and return again with Pierre Le Veque, and then Erickson counted out, apparently, some money. I was not close enough to observe just what it was, but he made a motion toward the Western Union operator and handed this piece of paper to the operator. There was some motions made there. I was not close enough to observe just what had actually taken place. Mr. Le Veque and Mr. Erickson were both at the desk. After that they walked away. I did not immediately thereafter go up and have a conversation with the Western Union operator. I did see the operator. I believe the young lady that testified a short while ago, the last witness, Ann Edelman. I did not say anything to her about this telegram. The following morning I went to the office of the Western Union after I contacted the law office or law division, accompanied a representative of the law division of the Western Union to the Western Union desk at the [fol. 82] Astor Hotel. That was the following morning, on the 17th of December, and the young lady at the time produced copies of the money transfers that had been sent that preceding afternoon. The young lady identified these Western Union money orders as the ones that had been sent about the time they were designated. Government's Exhibit 6 for identification—I have seen that before, at the Western Union desk at the Hotel Astor on the morning of December 17, 1935. On December 19, 1935, I did see Pierre Le Veque and Burt Erickson in the lobby of the Astor Hotel. They were both together on that occasion. At about 5:15, or thereabouts, in the afternoon, I saw Erickson pick up something from the desk at the counter at the Western Union and walk away and return later with Le Veque, and at the time he made some motions as they counted out money and handed it to the Western Union attendant there. On that occasion I immediately thereafter walked up to the Western Union operator and had a conversation with her. That conversation concerned the telegram just sent, the Western Union money transfer.

On December 19th when I saw Le Veque and Erickson there were two others that had been with them back further in the lobby and they came up to the desk or close by the desk with them and remained just about a foot apart. One, whose identity I learned later from a photograph to be named Geiger. Government's Exhibit 46 for identification is a photograph of Geiger. To my own knowledge I cannot identify the other man I then saw.

Mr. Dunnigan: I offer in evidence Government's Exhibit 14 for identification.

[fol. 83] Mr. Gallagher: Objected to on the ground that it is a violation of the Communications Act, Title 47.

The Court: That is overruled.

Mr. Gallagher: We place that objection against them going into evidence.

The Court: It is overruled on that ground.

Mr. Gallagher: Also object on the ground that there is absolutely no connection with anybody connected with the case.

The Court: Of course, this and a great deal of the testimony has been taken subject to a motion to strike out if not connected. That will be taken in the same way.

Mr. Gallagher: Also the further objection that the article offered in evidence is in the admitted handwriting of this witness, Miss Edelman, who testified here, and not say any of these defendants here. It is practically——

The Court: It is taken subject to a motion to strike out if not connected.

Mr. Gallagher: Exception.

(Government's Exhibit 14 for identification received and marked in evidence.)

Mr. Dunigan: I do not want to review the testimony at this time. If it is necessary to recall Miss Edelman, I can do so. My recollection of her testimony——

The Court: I mean on the general conspiracy charge, taken subject to a motion. I have not in front of me her testimony.

[fol. 84] Mr. Dunigan: Her testimony was that her writing on here was done at the request of Le Veque.

The Court: I understand what she testified to.

LORETTA CROWLEY, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan:

I am manager of the Western Union at the Hotel Astor and was such in 1935. I know Pierre Le Veque, one of the defendants in this case. I know a man named Burt Erickson.

The Court: Can you identify him?
The Witness: Yes.
The Court: Where is he?
The Witness: He is the gentleman that stood up then.
The Court: Stand up, Mr. LeVeque.

(A man stood in the court room.)

The Court: Is that the man?
The Witness: Yes, sir.

It is a very hard question for me to say when I first saw Pierre Le Veque. I transmitted Western Union money order applications for Le Veque and for Erickson. Government's Exhibits 21, 22, 23, 28, 30 and 31 for identification are Western Union money order applications in my hand. These applications that I just examined were filled out by me at the request of either Le Veque or Erickson. [fol. 85] All of those were at the request of either one or the other of those two persons.

By the Court:

The names they used are—the signatures on there. One is Louis Marchand. To tell the truth, it is over a year old. The names they used—Mr. Marchand, Louis Halle, Harry Rosen, Louis Halle, Harry Rosen and Bishop.

Mr. Dunigan: I offer them in evidence.
Mr. Gallagher: Same objection.
The Court: Same ruling; taken subject to connection.

(Government's Exhibits 21, 22, 23, 28, 30 and 31 for identification received and marked in evidence.)

By Mr. Dunigan:

I have seen Government's Exhibits 10, 18 and 20 for identification.

By the Court:

Witness: I accepted them. They are not my handwriting. I have a notation. The names used were Marchand and Harry Rosen, B. Friedman. That was likewise accepted from Erickson and Le Veque, either of those two gentlemen.

Mr. Dunigan: I will offer those in evidence.
Mr. Gallagher: Same objection.
The Court: Same ruling.

(Government's Exhibits 10, 18 and 20 for identification received and marked in evidence.)

[fol. 86] LILLIAN WEISS, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan:

I am chief operator of the telephone at the Astor Hotel. I was at the pay station, but now I am upstairs. In the fall of 1935 my particular duties related only to out calls, and I had a manager. I supervised the paystations in the hotel. We had eight booths. The numbers were 1 to 8, the telephone lines, the telephone exchange, Bryant 9-2152, 2153, 2154 to 2160. I know the defendant Pierre Le Veque and Frank Nardone, Burt Erickson and Nat Hoffman. I am not so sure about George Geiger. I know a man by the name of Jiggs. Government's Exhibit 46 for identification is the person Jiggs—I think it is. I know a fellow Bill by the name of Big Bill. I do not know if his name is Kleb. Government's Exhibit 48 for identification is Big Bill. I do not know a man by the name of John Saunders. I do know a man by the name of Big Red. I saw him a couple of times. Government's Exhibit 47 for identification is Big Red. We got outgoing calls and we received some incoming from the board upstairs. I just do not remember when I first saw Le Veque. It was prior to December, 1935, before Christmas. I knew him then. I saw him then. I saw Frank Nardone around the pay station then and Erickson around the pay stations and Hoff-

man around the pay stations and Geiger or Jiggs once in a while and Big Bill and Big Red once in a while. Dur-
[fol. 87] ing these times that I saw him around the pay stations I did see Le Veque talking to Frank Nardone once in a while and Le Veque talk to Erickson and to Geiger or Jiggs. I do not know what they were talking about.

I cannot say when was the last time, to the best of my memory, that I saw these men around the pay stations in the Astor. I won't say that—once in a while. They were in there steady. Our pay station closed in January this year. After that I did not see these men that I have named around the lobby there any more. I saw Mr. LeVeque once. Prior to December, 1935, they made their call and then went away, and then they waited, if the call was not ready. During this period of time in December, 1935, these persons that I have named, LeVeque, Erickson, Nordone and the others received calls there at the pay stations in December, 1935. I think they did. I do not remember the dates of the calls. I put up the call, I connected the call. I received calls for the men I have named. The only two I remember that made any long distance calls from the pay stations were Mr. Erickson and Mr. Le Veque. All I know about any long distance calls, they paid for it. Mr. LeVeque made long distance calls in November and December, 1935.

Q. Do you remember where the calls that LeVeque made went to? Where was the call to go to?

Mr. Gallagher: I object to this, your Honor. It is a violation of the Communications Act; the same objection as we made to the telegram.

[fol. 88] The Court: Where were you employed?

The Witness: Hotel Astor.

The Court: Objection overruled.

Mr. Gallagher: Exception.

The Court: Taken subject to a motion to strike out if not connected.

Witness: The call went that Mr. LeVeque made, the long distance call was to Yarmouth, Nova Scotia and Halifax. LeVeque and Mr. Erickson, I do not remember if Mr. Erickson make any long distance telephone?

Q. Do you know whether or not Erickson called Halifax and Yarmouth, one or the other?

Mr. Gallagher: I object on the ground it is leading.

The Court: What is your recollection.
The Witness: That they put in these long distance calls.
The Court: To where?
The Witness: To Yarmouth and Halifax.

Witness: Mr. LeVeque took calls for Mr. Durand. Received call there that would come in when they asked for Mr. Durand. When a call came in and asked for Mr. Durand, I called Mr. LeVeque. These long distance calls to Halifax and Yarmouth, the name of the party that the call was made to I think one was Adams—Ducos. The first name of Ducos, I think it is Harry.

Q. Mr. LeVeque and Mr. Erickson made calls to Harry Ducos—they called in, a lot of these calls, but they were charged to the hotel. That is why we accepted them. Long distance calls were made from Halifax and Yarmouth to these pay stations at the Astor Hotel. Mr. Erickson and [fol. 89] Mr. LeVeque answered these particular calls that were made. I do not remember anyone else ever speaking on the long distance call, to my knowledge.

Frank received calls at the pay stations in the Astor. His sister called him there. Frank made local calls over the pay stations. Frank is Mr. Nardone. Mr. Hoffman also received calls there.

I did not see him make calls over these stations. No, he wanted to go where the calls were five cents, downstairs. We charge ten cents for a call.

These persons I named received calls and made calls from these pay stations just during—there were calls a couple of months, November and December. That is the only time.

Q. Do you recall making a call for Mr. LeVegue to Bill Miller in Montreal, Canada?

Mr. Gallagher: I object. That is a violation of the Communications Act, and on the second ground that it is leading.
The Court: That is a good objection.

I never heard the name "Bill Miller." I do not know the person named "Bill Miller." I heard his name on the records, when the call was placed by either one or the other, Mr. Erickson or Mr. LeVeque. This is the message, Yarmouth, Nova Scotia.

A call went to Bill Miller at Montreal, Canada. I do not know which one placed it. No, sir; I do not know which one put those calls in, which individual call. The call to Bill Miller at Montreal was placed by Mr. LeVeque or Erickson, I think I wrote everything on Government's Exhibit No. 6 except what is written in pencil (indicating).

[fol. 90] Either Mr. Erickson or Mr. LeVeque; I am not sure, transmitted that particular money order application. After I wrote the message on it, I gave it back to them. The writing on there was done at their request.

Mr. Dunigan: I offer in evidence Government's Exhibit No. 6.

Mr. Gallagher: Same objection.

The Court: Same ruling.

Mr. Gallagher: Exception.

(Government's Exhibit 6 for identification received and marked in evidence.)

Government's Exhibits Nos. 24, 17, 16, 15 and 12 for identification are in my handwriting.

The Court: We will suspend for a little while.

(Short informal recess.)

(Record read by the stenographer.)

Mr. Dunigan: I offer them in evidence.

Mr. Gallagher: Same objection.

The Court: Same ruling.

(Government's Exhibits 12, 15, 16, 17 and 24 for identification received in evidence.)

Government's Exhibits 12, 15, 17, 16 and 24, I filled those out at either Mr. LeVeque's or Mr. Erickson's request. The names used as transmitter were Louis Halle, Harry Rosen. The other was Harry Rosen.

[fol. 91] Government's Exhibit 10 in evidence is in my handwriting.

I do not know a Mr. Nilsson. I do not recall receiving from the pay station a call from Mr. Nilsson for the Atlas Diesel Engine Corporation.

I do not recall Mr. Durand placing a call on that day or speaking to Mr. Nilsson of that firm, the Atlas Diesel En-

gine Corporation. A long distance call or a local call. I do not think I remember that.

I am known as Stevie. When LeVeque and Erickson and Frank Nardone called at the pay station they would call me Stevie because we do not give our names out. That was the name one of the managers called me. One day some gentleman from the drug store called me and that is how they got my name. He said hello to me.

The pay stations at the Astor kept a record of the calls that were made outgoing. Our company would keep them. That would include outgoing calls, both local and long distance. We had them when the man came to the hotel a year ago. We haven't got them now. We destroy them every six months.

EDMOND PARROT, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan:

My business is restaurant, located at 324 West 46th, known as the Belford Restaurant. The telephone number is Longacre 5-7994. It is a pay station.

[fol. 92] I know Mr. Pierre LeVeque. I know the defendant Frank Nardone. I do not think I know the defendant Robert Gottfried. I do not think so. If I saw the man, I can tell you. Some people come in my place and I never know the name.

I do not know a man by the name of Burt Erickson.

Big Red, I know him. Government's Exhibit 47 for identification is Big Red. I know a man by the name of Jiggs. I saw him a couple of times, I guess.

Government's Exhibit 46 for identification is the man Jiggs.

I have known Frank Nardone, must be about the 10th of January. Maybe 8th, 9th or 10th, I do not know.

I have known the defendant Pierre LeVeque nearly two years now. I first saw Nardone in my place, January 8th or 9th. He came with Mr. LeVeque. No others in the crowd not that day. I do not remember if they came back that day. I have seen Nardone since I first met him on January 8th or 9th of this year every day, every other day. He came to

my restaurant every day, pretty near every day around twelve o'clock. Sometimes he would stay one hour, sometimes two, sometimes three. Mr. LeVeque would also be there on those occasions. He stayed in my restaurant two or three hours sometimes two or three, sometimes one hour, for lunch. They would sit down together, Mr. LeVeque, and sometimes three or four, sometimes five.

I saw Big Red. He was there with Frank and LeVeque. I saw Jiggs there with Frank and LeVeque. He did not stay two or three hours; sometimes one go out and another one come. I do not know which one was going and coming back.

[fol. 93] I know a man by the name of Big Bill (Government's Exhibit 48 for identification). I think I saw him only once; I am not sure. I do not remember exactly.

I know a man named Nat Hoffman. Nat; yes, sir. I first saw Nat during January. I do not remember what time. January 6th I saw him there with Frank and LeVeque, but not very often, only once a week, maybe, twice a week, some time he was out for two weeks. Frank and Le Veque drank and ate and talked together. I do not know about what. I saw them talking over the telephone. They talked several times over the telephone. I do not know whether or not calls came into the telephone for them. Both answered when I answered the phone. They called, maybe, Mr. LeVeque and Mr. Frank. I answered the phone to find out if it was for me or somebody else.

I did not hear any of the conversations between Frank and Mr. LeVeque when they would be there. I did hear them speaking about case goods, something, I do not know what it was. I think it was brandy, because they got the goods from Mr. LeVeque, some brandy that is all.

I heard them say 200 cases or 300 cases. That is all. Mr. LeVeque and Mr. Frank; they were talking together.

I did not hear Jiggs talking about cases. I did not ever hear any person other than Mr. Frank, as you call him, and Mr. LeVeque talking about cases. I do not think I know a man by the name of Burt. I do not think so. I do not think I ever met any person at my restaurant by the name of Burt. I do not know a man by the name of Burt. I never heard that name before.

[fol. 94] Q. Step down from the stand, Mr. Parrot, and look around the court room and see whether you see any person in the court room that came there with Frank or Mr. LeVeque or with Big Red or with any of these other persons that you have named?

A. (Witness leaves witness stand and goes down into the court room.)

By the Court:

Q. What are you going to do?

A. Look around.

Q. For what?

A. He asked me——

Q. For whom, do you know?

A. I heard the question, to find if somebody came in my place with Mr. LeVeque and Mr. Frank.

The Court: Read the question. Listen.

(Question read by the stenographer.)

Q. Do you understand the question?

A. Yes, sir (indicating).

The Court: Indicate the man for the record.

Mr. Dunigan: Indicating the defendant Robert Gottfried.

The Witness: I saw this gentleman once (indicating).

The Court: What is his name?

Mr. Dunigan: Stand up, Mr. Velez.

The Court: What is the name?

Mr. Dunigan: Fred G. Velez.

By Mr. Dunigan:

Q. Do you know whether or not Frank and LeVeque went to Montauk Point in January or February of this [fol. 95] year?

A. I remember I got a call from Mr. Frank's sister on the phone. She said——

Mr. Gallagher: I object.

The Court: I will strike out anything Mr. Frank's sister said.

Q. Did Frank or Mr. LeVeque say anything to you about going to Montauk Point?

A. Mr. Frank told me if my sister calls just say we go to Montauk.

Q. Do you recall when Frank told you that?

A. When he left my place.

Q. What month?

A. Oh, I do not remember. It must be in February.

Q. It was after January 8th of this year?

A. Yes.

The Court: Yes, February is after January.

Mr. Dunigan: I understand that. I am trying to fix the time.

The Court: He says February. That is after January 8th. You do not have to tell me that.

Q. What else did he say about Montauk Point?

A. That is all.

Q. Did he say why he was going to Montauk Point?

A. No, sir.

Q. Did Mr. LeVeque talk to you about going to Montauk Point?

A. No, sir.

Q. Mr. Parrot, do you recall the conversation with Mr. LeVeque and Mr. Nardone where they told you to watch a car with a Virginia license on it?

[fol. 96] Mr. Gallagher: I object to the question. It is leading.

The Court: Yes. Do you know Mr. Nardone?

The Witness: Mr. Nardone.

Q. That is, Mr. Frank?

The Court: Did you hear anybody talk?

The Witness: No, sir.

Q. Did you see a car parked outside your restaurant from time to time with a Virginia license on it?

A. I saw once.

Q. Did you have any conversation with Mr. LeVeque or with Frank Nardone with respect to that car?

Mr. Gallagher: I object unless the time is fixed.

The Court: That will be the next question. Did you?

The Witness: Yes.

The Court: When was that?

The Witness: About the car?

Q. Yes.

A. It must be in February, the first week of March. I do not remember exactly.

Q. What was the conversation?

A. I was going to Ninth Avenue.

Q. What is that?

A. I was going to Ninth Avenue and I saw a man who was in my place a couple of times—about four or five times, and he was sitting in the car.

Q. Yes.

A. I came back home and I think it was Mr. LeVeque or Mr. Frank who said, "You better watch your car. This man was here last week. He has a nice car outside." I [fol. 97] was going away again. I do not know what happened.

Q. Do you know Mr. Martin, the investigator of the Alcohol Tax Unit?

A. Yes, sir (*indicating*).

Mr. Dunigan: Indicating Investigator Martin.

Q. Is that the gentleman you saw in the car with the Virginia license?

A. Yes.

Q. On March 20th of this year do you recall when the officers came to your restaurant?

A. Yes, sir.

Q. Do you recall whether or not LeVeque was there at the time?

A. Mr. LeVeque was not there.

Q. Was not there?

A. When I went down there.

The Court: Mr. LeVeque, was he there?

Q. When the officers came on March 20th?

A. Yes.

Q. Mr. Le Veque was there?

A. Yes, sir.

Q. Mr. Nardone was there?

A. Yes, sir.

Q. Mr. Gottfried was there?

A. Yes, sir; he came later, I guess.

Q. Who else was there?

A. Big Red.

Q. Big Red. Any others?

A. That is all.

Mr. Dunigan: That is all.

The Court: Le Veque, Nardone, Gottfried and Big Red; are those the names?

Mr. Dunigan: Le Veque, Nardone, Gottfried and Big Red, he said.

[fol. 98] Cross-examination.

By Mr. Gallagher:

I said something about a case of brandy. In my restaurant I had a license to sell liquor, therefore had a right to purchase liquor. Before this date that I spoke about, I know Mr. LeVeque was connected with the Pyramid Trading Company. The Pyramid Trading Company handle liquors and imported liquors. Before that time I bought from Mr. LeVeque brandy, only one case. I know the Pyramid Trading Company was out of business, but I got that case of brandy from another man down there. I show you the bill—I got the bill home in the box.

I do know after the Pyramid Trading Company ceased doing business that Mr. LeVeque had some of the stock of the Pyramid Trading Company to dispose of. I think Mr. LeVeque was interested in that firm.

I know at the time that Mr. LeVeque had over 200 or 300 cases of brandy coming from that firm. I believe it was brandy, champagne. I would not know what kind of champagne it is.

The Witness: Mr. LeVeque told me.

Cross-examination.

By Mr. Halle:

I saw Gottfried in my restaurant. I have a public restaurant there where people come and eat. How many times was Gottfried there I do not know; maybe ten times. Came there by himself and ate there. I did not have any conver-
[fol. 99] sation with Gottfried, say, "Good morning, I want lunch." He was not there with anybody.

Redirect examination.

By Mr. Dunigan:

When Mr. Gottfried came to the restaurant I saw him talk to Frank Nardone and LeVeque and Big Red. I do not know

when the Pyramid Trading Company went out of business. I heard that. I was not interested in that case. Maybe a year ago. That would be December, 1935. I thought he was in the business.

RAYMOND J. MAUERMAN, called as a witness on behalf of the Government, being duly sworn, testified as follows.

Direct examination.

By Mr. Dunigan:

I am Lieutenant-Commander of the U. S. Coast Guard. On January 26th of this year my boat, the Icarus, was at St. George, Bermuda. In March of this year I saw the Isabelle H at St. George, Bermuda, with Harry Ducos and James Bellman in command. I had a conversation with Harry Ducos and he said, among other things, "As soon as he could dispose of that cargo of alcohol which he had on board he was getting out of business as there was no money in it.

[fol. 100] My boat, the Icarus, had the Isabelle H under observation during the period from February 26th to March 13th of this year at St. George. On March 13th, this year, the Isabelle H successfully eluded my boat.

Government's Exhibit 36 is the Isabelle H and Captain Harry Ducos, one of the men on board.

(Government's Exhibit *36* for identification received and marked in evidence.)

I talked to Ducos two or three times.

KJELL H. NILSSON, called as a witness on behalf of the Government, being duly sworn, testified as follows:

(Stipulation on the record witness will testify as to invoices *of the* Atlas Diesel Engine Corporation, January 7th and 8th, 1936, showing the purchase of certain motor parts. They will be identified by the witness Kjell Nilsson; that a stock clerk, V. A. Strumel, placed the orders that he received and prepared them for shipment; a telephone call from Durand. He was instructed to call Mr. Durand when the parts were ready.)

[fol. 101] ADOLPH STEINFELD, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct-examination.

By Mr. Dunigan:

I know the defendant, Pierre LeVeque, for five, six or seven years. On or about February 13th of this year I received a telephone call from Mr. LeVeque, from New York. He talked to me about obtaining a boat and asked me if I still had a little one or the big ones. I said I only have the little one. "Well," he says, "I have a proposition." So I answered him that I was not interested in any proposition. "Well," he said, "it is good." He says, "I am coming up." So he came up to see about the matter, and I told him the same.

By the Court:

He did not mention what kind of a proposition. He wanted the boat of mine. I told him I had only one little boat, that the big boat I lost. He wanted me to charter a boat for hauling some kind of freight.

By Mr. Dunigan:

I worked for Mr. LeVeque before, but not for Mr. Erickson. He said he had a proposition for me. I figured it was something like that, hauling freight.

He did not mention what kind of freight. When Mr. LeVeque came to see me after this telephone call, he had somebody with him. I cannot remember what kind of car they were driving. I do not know the other person. I do not know the defendant, Frank Nardone.

[fol. 102] The Court: Go down and look at everybody in the courtroom.

The Witness: All right, your Honor. (Witness leaves stand and goes down into the courtroom.) Mr. LeVeque (indicating).

Q. See if you can see the man that came down with him?

A. No. (Witness resumes stand.)

I live at Montauk Point. The telephone number at my home is Montauk 96.

Afternoon session, 2:15 P. M.

BARNEY COOPER, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct-examination.

By Mr. Dunigan:

I live at Wildwood, New Jersey. I know the defendant, Pierre LeVeque about three years. I called Mr. LeVeque on the phone in February. He had been at my house and asked me to call. I called him on the phone. He was at Atlantic City. I had the number. I think I remember. It was the Bankers Tavern.

I talked to him over the telephone. I had some difficulty in reaching him at first. When I did get him on the phone he asked me how things were, how they were going, and he told me he had some cases outside, if I would be interested in getting something and bring them in for him. He did not mention what kind. He said cases.

He asked me if I could get a boat and bring them in, and [fol. 103] I said I would try. I was unsuccessful in getting a boat. I got in touch with him again and he came to Wildwood February, 1935. 1936. I beg your pardon. That is right. He had another man with him.

I do not know who that man was. Not by name, but I would know him if I saw him.

By Mr. Dunigan:

Q. (By Mr. Dunigan.) "Will you step down in the court room and see if you find him?"

A. Mr. Nardone on the right (indicating).

(Mr. Dunigan indicating the defendant Frank Nardone.)

Witness continues: When he came down to see me I had a conversation with Mr. LeVeque. Pertaining to the same thing.

He asked me if I was any more successful in getting in touch with anybody to get a boat and bring the goods. I told him I was no more successful. I told him we had another man that might possibly bring them in. I did not talk to Mr. Nardone, just to say "Hello."

He was present when I had this conversation with Mr. LeVeque. LeVeque said he had a boat off the coast, but

not what registry it was. He did not mention whether it was alcohol or whiskey or champagne. He said he had goods.

By the Court:

He introduced me to Nardone. He said, "Meet a friend of mine."

By Mr. Dunigan:

My telephone number at Wildwood? I have no telephone, but then they called me at 810 or 777.

[fol. 104] DANIEL SABIO, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan:

In March of this year I worked on the Southern Sword. I remember March 16th of this year being down at Newport News. I know the defendant, Callahan. I have known Callahan the time he worked on the ship. I worked on the Southern Sword from November, 1935, to March of this year. When we left Newport News on March 16th, we went and we met a boat out at sea that night.

Government's Exhibit 5 in evidence is the boat that I saw. We met the boat around ten o'clock that night. It was dark. We loaded some cases off of that boat onto the Southern Sword. I helped load them. This looks like one of the cases (indicating Government's Exhibit 34 for identification).

We loaded on the Southern Sword 950 cases, and the other hold 550. 1,600 cases altogether.

I know Captain Brown. He was in charge of the Southern Sword when we left Newport and met this boat. Captain Pendleton had been in charge of the boat before that from Boston to Newport.

Captain Brown did not talk to me when we were going out to meet this boat. He did not say anything to me. After we met the boat and put the cases on we came on to New York. I was asleep when we passed Governor's Island.

I did not see a tugboat come down the bay and meet the Southern Sword in the bay. The Southern Sword docked Pier 72. North River.

[fol. 105] During the times when I was on the Southern Sword we had never gone up the North River before. We always went up the East River to Bridgeport. I smelled something like liquor when we loaded these cases. Some of the cases were broken. Cans were in the cases.

I got my clothes wet with this stuff that was in the cans. I helped unload the boat at Pier 72. At the time they were not leaking any more. Other members of the crew helped unload. I saw men around Pier 72, the dock, when we docked that night. I see them inside the dock. I did not see Mr. Callahan there. I saw him at Boston. I did not see him down in Newport before the boat sailed this particular time. I did not see him at Newport News. I was busy working. We got into this pier in the North River about eleven o'clock. That was the next day after we had sailed from Newport News. I went on with the boat that night to Bridgeport. We had a load of coal on it.

Cross-examination.

By Mr. Nolan:

The Southern Sword did not have a wireless on it that was working when we left Newport. No wireless operator. My particular language is Filipino. That is Turkish and Spanish mixed. I was able seaman on this ship. I have an able seaman's certificate. I received that able seaman's certificate in New York. My hours on watch was twelve to four.

The Court: Go ahead.

The Southern Sword left Newport News about eight o'clock in the morning of March 16th. I was out on deck. [fol. 106] I did not go on watch again until twelve o'clock that night. The boatswain called the hands. I was on deck then. The weather when we left Newport News was a little foggy and cloudy. There was fog most of the time I was on watch; no heavy wind. The sea during the hours I was on duty from twelve to four was clear. Sea all right. It was not rough with a swell; no, calm. Calm all the time. No rolling sea.

EBEN BABBIDGE, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan:

I was first assistant engineer on the Southern Sword in March of this year. On March 16, 1936, we were at Newport News. Captain Pendleton hired me to work on the Southern Sword.

Q. Captain Pendleton?
A. Yes.

Prior to March 16, when we left Newport News, Captain Pendleton had not been in charge of the ship not all the time. He had been immediately prior to that. When we left Newport on that day, Captain Brown was in charge. I know Captain Brown. I do not remember seeing Mr. Callahan down at Newport News. When we left Newport, we stopped at sea and took on some cases from another boat. That occurred at night. I just do not understand about the position. Not just where it was. We were out of sight of land.

By Mr. Dunigan:

I did not have any conversations with Captain Brown, one of the defendants in this case, with reference to these [fol. 107] cases that we took on. I am not just sure, but I would say it was between nine and half past ten when I saw the other boat. I would not recognize it. I do not know how many of these cases did we take on board. I did see the cases.

By the Court:

I would say roughly, they started in about half past nine or ten and finished perhaps two o'clock in the morning. I am not sure about that because I had turned in. I came off watch at eight o'clock and was going to bed around nine. I was in my bunk when I saw them first, in the port hole. I did not do anything. Shortly after that I went to sleep. I took it for granted that it was perhaps a boat bringing a sick man on board or taking one off; that happens. I got

up about half past one and noticed the boat alongside. They were unloading cases. I stopped there a little while and went back to bed again.

By Mr. Dunigan:

I could not say if all the members of the crew of the Southern Sword were working (Exhibit 34 for identification). The cases that I saw, I would say was larger than that. I saw just a few cases down through the hatch. My smell is not good. I did not smell anything unusual. I did not personally help load the cases. I was up where this loading was going on possibly five minutes. Then I went back to bed. When we came on back to New York, we stopped down in the harbor near Governor's Island the next night. I did see a tugboat come up and meet the Southern Sword. I do know the defendant, Callahan. I saw what [fol. 108] I took to be Mr. Callahan come down and go on board the Southern Sword that night.

I had known Mr. Callahan about two months at the time. I saw a man get off the tugboat and come on board. I did not see him talking to anyone. He did not talk to me. He was on board altogether two or three minutes.

Mr. Nolan: Stand up, Mr. Callahan.

(A person stands in the courtroom.)

Witness continues: That is the gentleman I took to be *Mr. Callahan.* That is the gentleman that came on board. After he was on board he went back to the tugboat. And the tugboat came up the harbor. I do not know where she went. I am not positive. I do not know it. The Southern Sword came up the harbor to Pier 72. I am not positive if it went up the East River or North River or Hudson River.

The Witness: I was off watch; when I came off watch again we were going through the East River at four o'clock in the morning. I went to bed that night five to ten, as I remember. I did not know anything until next morning at four o'clock.

MICHAEL WYNN, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan:

I am a guard at Pier 72, in that vicinity. In March of this year I heard of a boat docking at Pier 72. It was a regularly used pier at the time,

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[fol. 109] FRED G. VELEZ, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan:

I am employed now by the Tidewater Oil Company. In March of this year I was employed on the Southern Sword. I know the defendants, Pierre LeVeque, Frank Nardone, Hugh Brown and Austin Callahan. I have known Mr. LeVeque about eight or nine years. I have known Mr. Nardone up until March, three months. I first met him in December, 1935, around the first part of December, 1935. I met Mr. Nardone in the Hotel Astor. I never was introduced to him. When we met at the Hotel Astor there were other persons present. Mr. LeVeque and also Burt Erickson. I know Mr. Burt Erickson. Nobody else was present then when I first met him. The conversation I had with Mr. LeVeque then, I do not remember what I said to him or what he said to me any more; general conversation, two friends meet each other. I met Mr. Erickson in the Hotel Astor; Mr. LeVeque also. I know of Red, and I know that was his name (Government's Exhibit 47 for identification). That is the man I knew as Red. I did not see him at the Hotel Astor. I saw him at the Belford Hotel and restaurant. That is 324 West 46th Street. I did not have any conversation with Mr. Nardone at the Hotel Astor.

I saw Mr. LeVeque and Mr. Nardone at the Astor since December, around December 1, 1935, until around the middle of January, 1936, an average of about once a week. [fol. 110] After January, 1936, I saw him at the Belford Restaurant, on the 20th, around the 20th of March, when

I was arrested in company with him. On the 20th of March at the Belford when I was arrested Nardone was there. LeVeque and Big Red were there. I know a fellow by the name of Geiger. He was there. I had dinner with LeVeque and Nardone at other places. Mostly Mr. LeVeque. Sometimes the others, that is, Erickson and Frank, as I knew him then—that is Nardone—would come in and join us.

Maybe we would have an hour or so down around midday and we would get in the restaurant and sit down and talk about general topics of the day, and the conversations to themselves, between LeVeque and Nardone, different company, most of the time Mr. Erickson regarding boats. And alcohol or liquor, whatever it is.

By the Court:

Well, Judge, it is hard for me to say what conversation it was, but this was not directly to me. The substance I do not know. When I first met Mr. LeVeque in 1936—in 1935, in December, when I was down, I was off the ship from the West Coast. I had not seen him for a year and a half. I asked him how was business, what he was doing. He said not much. I asked him if he was working. He says working, meaning running alcohol or rum, whatever it is. They told me about the boat, and the boat was tied up in New London. They had a boat tied up New London by the name of Puerto. I never questioned them much regarding it. LeVeque told me that because I know him for a long while. They never seemed to hide the con- [fol. 111] versation very much from me. But regarding the other business, I cannot remember.

The Court:

(Continuing.) It was about the next week or eight or nine days I would go up to see LeVeque. Sometimes Captain Erickson and LeVeque; most of the time LeVeque and Erickson. I would be present with them. I know a fellow called Nat. I met him. I never had dinner with him. I did meet Big Bill. I do not know if that is his name; Kleb (Government's Exhibit 48 for identification). That is the man. That man was named Bill at the Astor. I have seen him in company with LeVeque and Nardone and Erickson.

Most all the time they were talking about liquor. When I have been there Mr. Nardone asked LeVeque if he heard anything about the Pronto and LeVeque said no. At the time I understood from the conversation and talk with themselves that the Pronto was in New London and was seized or tied up or in distress of some sort.

The Witness: When I have been there Mr. Nardone asked LeVeque if he heard anything about the Pronto and LeVeque said no. At the time I understood from the conversation and talk with themselves that the Pronto was in New London and was seized or tied up or in distress of some sort.

The Court: Yes.

Q. Go ahead.

A. That she was seized by the Government.

Q. Did you hear anything from LeVeque or Nardone with [fol. 112] respect to the repairs for the Pronto?

A. Well, no, I never heard them say anything as far as repairs to the boat. I know they had some repairs. They told me they were repairing up at New London.

Q. Did you hear them say anything about the Isabelle H?

A. Oh, yes, the Isabelle H was mentioned.

Q. Tell us what was said about the Isabelle H and who was present. *Tell us everything you know.*

Mr. Gallagher: May I have a time on that?

The Court: Yes. When did you first hear about the Isabelle H?

The Witness: Around the same time.

The Court: Who was there?

The Witness: Mr. LeVeque, Mr. Erickson and Nardone.

The Court: What was said about it?

The Witness: I do not remember exactly what was said with regard to the boat. I knew they had a boat.

By the Court:

Q. Tell us what you do remember.

A. He said LeVeque—that he had a boat. LeVeque said he had the Isabelle H.

Q. Boat for what?

A. I guess for rum or liquor or alcohol.

Mr. Gallagher: I move to strike that out as a conclusion.

Q. Is that what he said?
A. Yes, sir.
Q. Is that what he said?
A. What?
[fol. 113] Q. Rum and liquor? Did he say that?
A. Yes, I understand that is what the boat had in it.
Q. Did somebody say that? Is that what they were talking about?
A. Yes, sir.
Q. That is what he said?
A. Yes.

The Court: I will let it stand.

By Mr. Dunigan:

Q. Did you hear Big Bill say anything about the Isabelle H?
A. No, sir.
Q. Did you hear them talking about Halifax and Yarmouth and Nova Scotia?
A. Yes, I did.
Q. Tell us what you heard about that.
A. I overheard conversation between them.
Q. This is the talk of these defendants. Tell us in whose presence they were talking.
A. Three of them were talking, one to the other. That is how I heard it. It was talk.
Q. LeVeque, Nardone and Erickson?
A. LeVeque, Nardone and Erickson—both of them.

Mr. Gallagher: May I have a date on that, your Honor?

The Court: When was that, about?
The Witness: The first part of December, around about the first week or second week in December; in December, 1935.

Q. Go ahead.
A. What is the question?

(Read by stenographer.)

Q. (Continuing) Go ahead. Tell us about that conversation about Halifax and Yarmouth.
A. As I understand from the conversation with them [fol. 114] they had the Isabelle H and the Pronto in New London.

By the Court:

Q. Who said that?

A. Mr. LeVeque.

Q. All right. Go ahead and tell us what he said.

A. Your Honor, but I cannot remember the conversation. They were not talking to me. It was just regarding the boat. I do not know who said it. I do not know. They are making sentences out of it.

Q. Each time they were talking about liquor, bringing it in?

A. That is the substance.

Mr. Gallagher: I object to your Honor's question on the ground it is leading, and I move to strike out the answer.

The Court: Overruled.

Q. Is that what they were talking about, liquor?

A. Yes, sir.

Q. At every conversation?

A. No, not every conversation.

Q. How many conversations did you hear talk about liquor?

A. I do not know, about once a week or two weeks or ten days, have dinner for an hour. We talked about general topics.

Q. How many times did they talk about liquor? Answer my question.

A. Pretty near all the time.

The Court: That is what I want to know.

By Mr. Dunigan:

Q. Did you have lunch with LeVeque or Nardone at the Normandie Restaurant?

Mr. Gallagher: I object on the ground it is leading.

[fol. 115] The Court: Overruled.

Q. Outside of the Astor Hotel did you dine with LeVeque and Nardone at any other place in New York?

A. Outside of the Hotel Astor?

Q. Yes.

A. Yes.

Q. Where?

A. Normandie once or twice; in the Belford two or three times.

Q. When you ate with them in the Normandie Restaurant, who was present?

A. Mr. LeVeque, Erickson and Nardone.

Q. Did you hear them talking about that time?

A. Generally, yes.

Q. Can you say whether that was in December, 1935? Can you give us a specific date on it?

A. Well, specific date, it was in the first part, during December, around the 1st of December, and the holidays.

Q. Did you hear them say anything about the Isabelle H and the Pronto at that conversation?

A. Yes.

Q. What did they say and who said it?

A. They said—Mr. LeVeque and Erickson, they had the Isabelle H out at sea and Captain Bucos was the captain of her, and the Pronto was working from the Isabelle H, all I could understand from the conversation about themselves. I was only present.

By the Court:

Q. You are not telling everything. Tell what happened.

A. I am.

Q. You are not telling everything.

A. It is hard for me to remember the conversation.

Q. You had better jog up your memory a little bit.

(No answer.)

[fol. 116] By Mr. Dunigan:

Q. Did you hear Mr. Nardone talk about the Isabelle H and the Pronto?

A. Yes.

Q. What did he say about it?

A. He said that they had this boat outside and she was tagged by the Government boat and they could not get the cargo ashore, and other things regarding it.

The Court: What other things? Tell us.

The Witness: All I can say, your Honor, I understand there that they had had a boat out there with liquor and were trying to get it in.

The Court: Who said that?

The Witness: Mr. LeVeque and Mr. Erickson and Nardone.

Q. Do you recall a conversation in the Normandie Restaurant when Big Bill Kleb was there?

A. Kleb was there—Bill was there, Kleb. He was in the Normandie Restaurant when I came in.

Q. Do you know whether or not he had been up to Halifax?

A. Yes, at the time he was just from Halifax.

Q. Who was present at the time besides Big Bill?

A. Mr. LeVeque and Mr. Erickson and Nardone.

Q. Did you hear Big Bill talk to Nardone and LeVeque and Erickson?

A. Yes.

Q. Did he say anything about Halifax or the Isabelle H?

A. No, he did not say much about the Isabelle H. He said regarding the expense of the crew on the Pronto. They were debating whether to buy the boat.

Q. What did they say about who was going to buy the [fol. 117] boat?

A. He said—Big Bill—I heard him make an offer that he pay the crew part of the money, and he owed them seven or eight hundred dollars more, and they would probably get the boat to sail without paying the balance of the money.

Q. Did he say where the Pronto was going to sail to? Was that while she was in New London, or was it up in Halifax?

A. She had been left in New London, I think.

Q. To go to Halifax?

A. I do not know whether she went to Halifax by sea or where.

Q. Did you hear Big Bill say anything about the Isabelle H at the time?

A. No.

Q. During these conversations between LeVeque, Erickson and Nardone and Big Bill, did you hear them discuss anything about finances or money?

A. Regarding the financing of the boat?

Q. Yes, or any other thing.

The Court: Money?

Mr. Dunigan: Yes.

A. Well, yes, I heard them discuss finances at times when Bill came from Halifax, he wanted more money to send up to pay the crew, as I could understand from them.

Q. Did you hear Big Bill say anything about Captain Ducos?

A. No, he did not say anything about Officer Ducos.
Q. Do you know Captain Ducos?
A. I know him if I see him, yes.
Q. How long have you known him?
A. Four or five years.
Q. Do you know James Bellman?
A. I know him.
[fol. 118] Q. How long have you known him?
A. About five years.
Q. Did you hear LeVeque, Nardone and Erickson talk about Ducos and Bellman being on the Isabelle H?
A. Yes.
Q. Did you have lunch with those fellows up at the Belford Restaurant?
A. Yes, I had lunch two or three times at the Belford Restaurant.
Q. Mr. Nardone, Mr. LeVeque and Mr. Erickson?
A. Yes.
Q. Big Bill?
A. I do not remember if Big Bill was at the Belford Restaurant.
Q. Did you see Big Red?
A. Big Red was there, yes.
Q. You heard them talking on those occasions at the Belford?

Mr. Gallagher: May I ask that a time be stated.
The Court: Yes, fix the time.

Q. Tell us, if you can remember, what month and the date, if you can, that you saw them at the Belford.
A. I only seen Red Saunders at the Belford once.
Q. Yes?
A. I think that was in March, when I was arrested there.
Q. How many times did you see Mr. Nardone there?
A. Two or three times.
Q. How many times for Mr. LeVeque and Erickson?
A. The same.
Q. Were you down at Newport News in March of this year? Do you recall the date in March when you were at Newport News?
A. Yes, sir.
Q. What date was it?
A. March 16th.
[fol. 119] Q. Who was in command of the boat at the time?

A. Captain Brown.

Q. Prior to your leaving Newport News who had been in charge of the ship?

A. Captain Pendleton.

Q. What was your position when Captain Pendleton was in charge?

A. Third mate.

Q. What was your position after Captain Brown assumed control?

A. I never was reinstated or advanced.

By the Court:

Q. Did you have liquor on this boat?

A. Yes.

Q. Where did you get it?

A. At sea.

Q. Were you on there at the time?

A. Yes.

Mr. Nolan: I must on behalf of the defendants Callahan and Brown enter an objection now.

The Court: You mean the word "liquor"?

Mr. Nolan: I do not concede it. We deny it.

The Court: I will strike it out.

Mr. Nolan: Not only that, but I ask your Honor to let the United States Attorney put the questions. I believe in this case, in fact my two clients——

The Court: I assume it is.

Mr. Nolan: I do not think this question should be put, the question to be asked by your Honor, to put this question.

The Court: You may not think so.

Mr. Nolan: Exception.

Q. Tell us what happened when you met at sea.

A. When we was at sea the boat stopped——

[fol. 120] Q. Yes.

A. About six or seven miles of Winter Quarter Light Ship, and a small boat came alongside and I was called on my watch below and they had called the boat there, and I came up and the crew were on deck. We made fast the boat and took a load of liquor or alcohol from cases, on the Southern Sword.

By Mr. Dunigan:

Q. Did you see the little boat?

A. Yes.

Q. Did you recognize it?
A. Yes.
Q. I show you Government's Exhibit No. 5 in evidence and ask you to state if that is the boat that you saw?
A. Yes, that resembles the boat very much.
Q. How many pieces did you take on?
A. I understand 1,600 cases.

Mr. Nolan: I ask that that be stricken out.
The Court: Yes, leave it out, what was understood.

A. (Continuing.) I was told by Captain Ducos it was 1,600 cases. I spoke to him on the ship.
Q. You saw Captain Ducos on board this other boat?
A. Yes.
Q. You talked to him?
A. I asked him how many cases he had.
Q. What did he say?
A. 1,600.
Q. Did you hear Captain Brown say *anything to* Captain Ducos?
A. No, I did not, sir.
Q. Did you see Bellman on the other boat?
A. Yes.
Q. *Did you talk to* him?
A. A couple of minutes, yes.
Q. What did he say and what did you say?
[fol. 121] A. I asked him how many cases he had on. Bellman also said we had 1,600 cases.
Q. Yes?
A. And he told me—he said, "We had a hard time getting rid of the cargo. We are just from Bermuda two or three days ago, they got her out, eluded or escaped the Coast Guard."
Q. Who said that?
A. Bellman.
Q. When you left Newport did you know that the Southern Sword was going to stop?
A. No, sir.
Q. Who told you that it was going to stop?
A. Well, we got outside and Captain Brown told me he was going to stop and take on some cases.
Q. Did he say cases of what?
A. Yes. He said alcohol.
Q. What did you say to him about that, if anything?

A. I said to the captain, "There is not much money in that business for any of us," and I said to him, "It is best for us to go on and do not bother with it." He said, "We will go by and do not stop. If the vessel is there we will stop; if not, we will continue."

Q. When you got there the boat was there?

A. I was called about ten o'clock that the boat was there.

Q. On the way out, after Captain Brown told you he was going to stop and take on these cases of alcohol, did he say anything to you about it, talk to you about it?

A. Regarding the alcohol and talked about alcohol?

Q. Yes.

A. When he got out there he had a card with two names. He said, "Mr. Velez, do you know any of those names?" And he showed me a card and I looked at it and said, "No." [fol. 122] I said, "No, I do not know any of them." One of the names on the two cards, I believe, was Edmond and the other was Godfrey, on the card that Captain Brown had.

Q. Did you see the name Edmond?

A. Yes.

Q. How was it spelled?

A. E-d-m-o-n-d.

Q. Did you see Godfrey?

A. Yes, sir.

Q. He asked you if you knew either one of those persons?

A. Yes.

Q. Did he say anything about the two names on the paper?

A. No. He said those were the two fellows that had a cargo. I said, "How many other people?" I said, "You cannot go by name either. They may be phony names."

Q. Did you hear Bellman talk to Captain Brown when you stopped off Winter Quarter Lightship?

A. No, sir, I did not.

Q. Did you hear him talk to Ducos?

A. No.

Q. Did you see any other members of the crew on this boat that stopped?

A. No, sir, none of the crew from the ship.

Q. Did you assist in loading cases?

A. Well, partly, yes.

Q. Tell us what you did with respect to that?

A. When I was called on the watch the boat was there and the crew was on deck. We took a line and made fast

the boat and all crew they turned to and started and put the cargo abroad, and the cargo—took the cargo and stopped.

Q. Did all the members of the crew help with the loading?

A. No, not everyone. There were a few that did not help.

Q. Do you know whether or not the assistant engineer helped?

A. No, the assistant engineer did not help with any of the cases. I did not see him, in fact, help.

[fol. 123] Q. Does this look like the cases that were taken abroad (indicating)?

A. Yes, it is similar to them that we loaded.

Q. Referring to Government's Exhibit 34 for identification. Did you see any of the contents of the cases?

A. Yes, sir.

Q. What was inside?

A. Well, it smelled like alcohol.

Q. Was it in cans?

A. Tins, two or three gallon tins, two tins to the case.

Q. Were any of the cases or tins leaking?

A. Yes.

Q. Did you get any on your clothes?

A. No, I did not get anything on them.

Q. Did you smell it?

A. It smelled like alcohol.

Q. Did you see the defendant Austin Callahan at Newport News before you sailed?

A. Yes, sir.

Q. Did you talk to him?

A. No, sir.

Q. What did you see him do?

A. We got in Newport News late that evening. Mr. Callahan came and he stayed abroad, I should say, about twenty minutes, and he went over to Captain Brown and Captain Pendleton.

Q. Did you see Captain Pendleton come back on board?

A. I do not remember whether Captain Pendleton came back that—I did see him while they were on the other small boat, small tugboat, and Captain Brown came over.

Q. Did he say anything to Captain Pendleton?

A. No.

Q. Did you hear Brown say anything about Pendleton coming back on the ship at the time she sailed?

A. In the morning after the ship had loaded the coal and [fol. 124] Captain Brown and Captain Pendleton—I asked him for ten dollars. I wanted to send a letter. He said, "I will give you ten dollars." He said, "Where are you sending it?" I said, "To New York, my home." He said, "I will mail it in New York." I said, "That won't do so much good. We will be up in New York on the ship. The letter will get there by ship then." He says, "I am going to New York." I says, "Aren't you going on the ship?" He says, "No, Captain Brown has got to take the ship." We were then ready to sail.

Q. Did Captain Brown say anything to you after you left Newport about whether the contact with this other boat was to be made?

A. Yes, I asked him.

Q. What did he say?

A. He said six or seven miles east of Winter Quarter Lightship.

Q. Do you recall the Southern Sword stopping in the harbor the next night when it came into the New York Bay?

A. Yes.

Q. Where did it stop?

A. I do not know if she stopped. We did not exactly stop, did not anchor. We got a small head off the Statute of Liberty or abreast the Statute a tugboat came opposite us.

Q. Did you see anybody get off the tug and come on the boat?

A. I was on the forecastle head, the funnel part of the ship, standing by the anchor. It was about 200 feet from the tug.

Q. How long was the tug there?

A. I should judge, roughly, two or three minutes; not longer.

Q. Did you see her leave and come on up the bay?

A. Yes.

Q. The Southern Sword came on up to Pier 72?

A. Pier 72.

[fol. 125] Q. And unloaded the cases there?

A. Unloaded the cases there.

Q. Did you see any persons down on the dock?

A. Yes, I saw seven or eight men receiving the cargo.

Q. Did you see trucks there?

A. Yes.

Q. How many trucks did you see?

A. I saw three trucks. I stepped off on the dock and I saw three trucks. They were loading on two trucks and one truck was over there ahead on the dock.

Q. The cases were being put on the trucks?

A. Put on the trucks.

Q. Did you recognize any of the men you saw there?

A. I would not with my—I could not.

Q. Did you see Big Red there?

A. No, sir.

Q. Can you tell us approximately when this unloading at Pier 7 was finished? When did you get through, if you can remember?

A. Yes, I can remember.

Q. What time was it?

A. Pretty close to one o'clock in the morning.

Q. That would have been March 18th?

A. March 18th.

Q. How long did it take to unload altogether?

A. Approximately two hours and a half.

Q. How long did it take you to load at sea near Winter Quarter Lightship, about the same time?

A. Approximately the same. Not over three hours.

Q. Did you accompany the Southern Sword on to Bridgeport?

A. Yes.

Q. During the time that you had been on the Southern Sword before had you had occasion to go up the North River before?

A. No, sir.

[fol. 126] Q. This was the first time, so far as you know, that it had gone up the North River?

A. Yes, sir.

Q. By the North River you mean what is known as the Hudson River?

A. The Hudson River.

Q. When you got to Bridgeport on the Southern Sword, did you come back on the boat to New York?

A. No.

Q. Came back by train?

A. Came back by train about three days after.

Q. Did you see Callahan after you came back?

A. Yes, I went up to his office.

Q. Did you have a conversation with him?

A. No. I went up to get my mail.

Q. Did he say anything to you at all?

A. No, sir.

Q. Where did you go after you left his office?

A. I went up to see LeVeque, in the Belford Restaurant.

Q. Did you see Mr. LeVeque and any others?

A. Nardone was there.

Q. Yes. Was he there when you were talking?

A. Yes. And Red Saunders. I went up there to see who owned the cargo, if I could find out who had the cargo.

Q. Did you see the *defendant Gottfried* up there?

A. No, sir, but I understand a man named Gottfried came into the restaurant just at the time after the men came in.

Q. Which man do you mean? Point him out.

A. That man to the left (indicating). The last man to the left.

Mr. Dunigan: Indicating the defendant Robert Gottfried.

A. (Continuing.) Yes.

[fol. 127] The Court: Where did you see him?

The Witness: In the restaurant, Belford Restaurant.

Q. Belford Restaurant?

A. Yes.

Q. He came there?

A. He came there while the men were in there.

Q. Yes. When you got there you saw LeVeque and Nardone and Saunders there?

A. Yes.

The Court: What happened? What was done at the time?

The Witness: When I met them there?

The Court: Yes.

The Witness: I asked Mr. LeVeque who had the cargo on the Southern Sword and he said, "Where were you, Captain?" He said, "Where were you?" I said I was third mate on the Southern Sword. He said, "On the Southern Sword?" I said, "Yes." I said, "Who had that cargo? He had that cargo." He said "The cargo came in light." I said, "You got 1,600 cases through the night." He says, "No, Captain, we did not." I said, "Yes, you did. Somebody got 1,600 cases Tuesday night." I said, "Who had

the cargo?" He says he sold the cargo. LeVeque said he sold the cargo to somebody and was going to send us our supplies and deliver them. I said, "So far nobody on the ship had any money"—this was Friday—"and the cargo was delivered Tuesday." Before he told me—he had finished the conversation and the Government men came in and seized us.

By the Court:

Q. Who was there during this talk?

[fol. 128] A. Mr. LeVeque, Mr. Vardone and—what is his name—Red Saunders.

Q. Yes.

A. And George Geiger.

Q. Anybody else?

A. No, sir; nobody as I know of. There were some other people in the restaurant that day, but I did not know them.

By Mr. Dunigan:

Q. Is that all the conversation that you had at the time?

A. Yes, sir.

Mr. Dunigan: That is all.

Cross-examination.

By Mr. Gallagher:

Q. West 46th Street Restaurant was a place where a great many seafaring men gather at times, isn't it?

A. I should not think so, sir.

Q. Some?

A. I did not see any there that I know about. I have been to sea 28 years.

The Court: Where is that?

The Witness: Between Eighth Avenue and Seventh Avenue. I am not positive, Judge.

Q. It is a French Restaurant?

A. I understand that.

Q. Do they have Italian style dishes, do you know?

A. I could not say. I never ate their Italian dishes. I had mostly American dishes when I was there.

Q. The patrons, so far as you could observe at the times you were in there, were not in any particular rush to get out?

A. Well, no.

Q. It was a place of free time rather than one of these quick lunch places, as soon as you ate and drank——

A. I do not think there was any difference.

[fol. 129] Q. As far as you were concerned, you paid for what you got and got up?

A. As soon as you get up and pay.

Q. The average person that went in there took at least an hour or so to eat his meal?

A. Yes, about an hour.

Q. You knew Mr. LeVeque for nine years or more?

A. Yes, eight or nine years.

Q. May I ask your nationality?

A. Porto Rican.

Q. Mr. LeVeque is French. I wondered whether it was the same. You did not meet Mr. Nardone until December, 1935; is that correct?

A. That is right, sir.

Q. He was one of the customers at that restaurant at the time when you saw him?

A. Yes, sir.

Q. There were other men who make a practice of going there fairly regularly, whom you later came to know, is that right?

A. They were all talking with Mr. LeVeque, the ones I know.

Q. There was a crowd that would gather there perhaps two or three in your group, sometimes, with Mr. LeVeque; sometimes more?

A. Well, yes.

Q. That was during the lunch hour?

A. Only at lunch hour I have been up there.

Q. These men whom you knew had the practice, when they came in for lunch, and they saw any of the other men, they would join them at the table? Did you see any of them come over and join them at the table?

A. I mostly was up there with LeVeque. If LeVeque was not there, he did not join them.

Q. You had many conversations with Mr. LeVeque dur-

[fol. 130] ing this period of December and January on the numerous occasions that you went in?

The Court: Had a lot of talk?

The Witness: Like what, may I ask?

Q. Generally with reference to seafaring movements?

A. Well, Mr. LeVeque would ask about drafts and weather and costs and expenses and certain work on the boat, which I would tell him voluntarily.

Q. Some of these others that you have described would be present during the conversations; is that correct?

A. Some of them would not be there, but some would.

Q. The conversation with reference to boats or anything like that was more particularly between LeVeque and you?

A. Well, no, unless I was specially asking questions with reference to our business or cost or expenses of certain work on the boat, then he would specially address me, ask me if I could tell him that. Several times they got up from the table after LeVeque and Erickson were saying something regarding the boat, and they would go to the table and take a few minutes and come back and the thing went on. It was hard for me to describe the conversation. These were in piece words. I could get it every day.

Q. Gottfried you never saw until the day of the arrest?

A. Until he came into the restaurant. Then they were arresting us, the Federal men.

The Court: Was he there that day with you?

The Witness: No, sir.

The Court: What was he doing?

[fol. 131] The Witness: I do not know. He came in while the Government officials were in, about eight or nine men had Mr. LeVeque and all of them arrested, and he came in at the time.

Q. You say there was a Saunders that came in there occasionally also?

A. I only saw Saunders once in the Belford Restaurant.

Q. When he came in did he come over and join the table where LeVeque was?

A. I do not remember whether he came in there and joined the table or whether he went in there with Mr. LeVeque or we joined him. I cannot say that either, which one it was.

Q. Were there any particular conversations then between Saunders and LeVeque and you with reference to any boats?

A. No more than any conversation we had along the line, anything more than that. Anything important, they would get up and talk to themselves and come back to the table.

Q. At the time none of them ever talked to you outside of LeVeque and Erickson, particularly with reference to any boats?

A. No, sir.

Q. So if any of the others were present at various times the only conversation with reference to boats was between Erickson, LeVeque and you, is that correct?

A. Well, about one time it was referred to me; so Mr. LeVeque once in a while would ask.

Q. I do not mean did you talk generally apart in any conversation. If there were general conversations about one thing, particularly reference was made with reference to boats, that would be either by Erickson or LeVeque and [fol. 132] you on an inquiry and not by these others whom you described, is that correct?

A. That is right.

Q. So that at any time during these conversations that you have described on your direct-examination the others whom you said were either at the different conversations, and they were just mere spectators there, they had no particular interest except they happened to be there?

The Court: How can he tell what interest they had? That is a conclusion.

A. Regarding who?

Q. For instance, Hoffman or Saunders?

A. Yes, they seemed to be interested in it.

Q. They were interested in the answers?

A. Answers from whom?

Q. Between LeVeque and you?

A. Yes, if the answers was regarding the expenses of a boat or the distance or place they traveled and the cost. It seemed to be the same company or same crew.

Mr. Gallagher: I move to strike that out.

The Court: You asked for it.

Mr. Gallagher: May I have the question read?

(Record read by the stenographer.)

The Court: You asked him whether he was interested. That is a conclusion. He has a right to tell you.

Mr. Gallagher: That answer should refer to Saunders and Hoffman, I believe.

The Court: Your question was answered.

[fol. 133] Mr. Gallagher: May I ask the stenographer to read the question that I asked him?

(Record read by the stenographer.)

Q. You then saw Mr. LeVeque afterwards? As I understand your testimony, you said that he told you that the cargo on the Isabelle H had already been sold.

A. I asked Mr. LeVeque—I said, "Who had the cargo on the Southern Sword?" I said, "Did you have it?" And he said he sold the cargo to some party who had the cargo, he sold it to some party. I said whoever had the cargo ought certainly to pay the crew on the ship, send them the money for it.

Q. Did you know that at the time he referred to the cargo—you were talking about the Isabelle H or referring to the cargo that was on the Isabelle H?

A. The cargo; we talked about the Isabelle H.

Q. Did LeVeque tell you that it had been sold?

A. That cargo has been sold, the cargo he had on the Isabelle H has been sold.

Q. And the cargo he had on the Isabelle H had been sold while the Isabelle H was at sea, is that correct?

A. That is right.

Q. You say you made contact with the Isabelle H on March 16th or 17th, is that right?

A. March 16th with the Isabelle H.

Q. And at the time it was six or seven miles offshore, off the lightship?

A. Off Winter Quarter Lightship.

Q. Do you know how far off Winter Quarter Lightship you saw it?

A. Approximately twenty miles—eighteen or twenty miles.

Q. The contact that was made by the Southern Sword [fol. 134] and the Isabelle H was about twenty-seven or twenty-eight miles offshore?

A. Yes, I would say twenty-five to twenty-seven miles.

Q. LeVeque had told you that the cargo had been sold prior to the time that it was on the Isabelle H?

A. Yes.

Q. So that you came down and asked LeVeque for money for the crew?

A. I did not ask him for money for the crew. I asked him who owned the cargo, that it was not fair, that the crew

on the boat, on the ship, had no money, had received no money. I says who had the cargo, they did not pay for it, whoever had it.

Q. Was it Bill Kleb that asked him for money for the crew?

A. Not on this boat.

Q. Did Mr. LeVeque tell you that the Isabelle H was outside for a long time?

A. I understood from him that.

Q. What?

A. I understood from him that, she was outside for a long time.

Q. It was being watched by the government boat?

A. Yes.

Q. The word you used was being "tagged" by government boats?

A. Yes.

Q. That is, the movement of the Isabelle H, the government men were watching the movements?

A. As I understand it.

Q. Mr. LeVeque was the man who told you that?

A. Yes.

Q. Did Mr. Erickson ever say anything about that?

A. Well, Mr. Erickson talked about the same as Mr. LeVeque does. That is, at times in my presence he mentioned that, the time they were talking about business. They would get up from the table and go over and talk and come back again. Very little of the private business [fol. 135] they would discuss before me at the table.

Q. Between the two who were discussing business?

A. Yes.

Q. With reference to these matters that you say they had under discussion, they were the only two who were discussing it, so far as you heard?

A. No, I should not think it was them two alone. I have heard Mr. Nardone discuss it, Mr. LeVeque and Mr. Erickson.

Q. The guests who were at the table, they would join in?

A. Yes, once in a while talk—about the details.

Q. Just the same as any other person who would have casually listened to the talk of these men?

A. No, it was not casually.

Q. Others once in a while, they were in on it also? Would they be interested in the topic?

A. It would be an interesting topic; they would be interested.

Q. They would be interested in the story, in the tale of the party?

A. No, I should say they were interested in the tale according to the conversation I heard.

Mr. Gallagher: I move to strike that out as a conclusion.

The Court: That is your trouble. You are asking for those opinions, asking whether they were interested in that. You take a chance in asking those questions.

Q. All you heard was conversations there when somebody was sitting and talking?

A. Yes.

Q. As far as you were concerned, you were not interested [fol. 136] with these particular persons outside of LeVeque and Erickson? That is all you knew about them; they just happened to be there?

Mr. Dunigan: I object to the form of the question. I don't understand. I do not know whether the witness does or not.

The Court: Do you understand?

The Witness: I do not understand. It is not explicit.

Mr. Gallagher: I will try to reframe it so Mr. Dunigan will understand it.

The Witness: Maybe I will understand it, too.

Q. Many took part in the conversations at the dinner table; is that correct?

A. Yes.

Q. These people appeared to be interested in the topics that were being discussed?

A. Yes, sir.

Q. As far as you are concerned, you had no particular interest in any of these topics except the Southern Sword incident; is that correct?

A. Well, no, I had no interest in it before and I had no interest in it after the Southern Sword was seized, only I wanted to know who owned the cargo. I knew the cargo was delivered. I wanted to know who it was delivered to. If somebody got the cargo, the crew on the ship should have got some compensation.

Q. When were those inquiries made? When did you have this conversation?

A. Regarding who owned the cargo?

Q. Yes.

A. On a Friday, I think it was, March 20th, the day we were arrested in the restaurant.

[fol. 137] Q. Were you there that day?

A. Yes.

Q. You were arrested also?

A. Yes. That is, I assume you call it arrested; all was taken down to *Mr. Dunigan* for questioning.

Q. Before the United States Attorney who is prosecuting this case?

A. Yes.

Q. How long were you in Mr. Dunigan's office?

A. I was down there a couple of hours and they questioned me about a few things regarding it, and they told me I could go home and come back the next day. I went back at ten o'clock the next day and they questioned me regarding the boat, the Southern Sword, and told me I could go again and come back. I went down two or three times, off and on. I was under subpœna.

Q. Each time you were questioned. How long were they questioning you?

A. I should say roughly half an hour at a time; one time maybe an hour; not longer.

Mr. Gallagher: That is all.

Mr. Nolan: I would like to ask one or two questions for the defendants, Callahan and Brown.

Cross-examination.

By Mr. Nolan:

Q. When did you sign on the Southern Sword?

A. I do not remember the exact date, Mister, but it was approximately around the first part of March. I do not remember the exact date, but it was in the first part of March.

Q. Where?

A. In Bridgeport, Connecticut.

Q. You went from there to where?

A. Newport News, Virginia.

Q. *How many* days did that take?

[fol. 138] A. I do not know—two days, fifty or sixty hours, roughly.

Q. How long did it take to load the cargo, all told?

A. Eight or ten hours.

Q. Did you sail at nighttime on the first voyage or daytime?

A. Generally sail in the morning.

Q. How long did it take you to go to your next port?

A. From Newport on the first trip, we went to Boston, I think. Five or six days, approximately, I think it was.

Q. And unloaded the cargo of coal in Boston?

A. Yes.

Q. The Southern Sword was engaged in the coal-carrying trade?

A. Yes, sir.

Q. Did you go back again on the Southern Sword?

A. Yes, sir.

Q. Who was captain?

A. Captain Pendleton.

Q. Was he captain on the first voyage?

A. No, sir; Captain Brown was.

Q. On the way back from Newport who was captain?

A. Captain Brown. On the second voyage, Captain Brown.

Q. On the return on the first voyage—maybe I am wrong—I am calling the voyage from one port to another, instead of a round trip. Take the first voyage you spoke of at Bridgeport——

A. Bridgeport.

Q. Who was captain of the ship?

A. Captain Brown.

Q. You went down to Newport, didn't you?

A. Yes.

Q. It took you about fifty hours?

A. Yes.

Q. Who was captain when you came back?

A. Brown.

Q. And then on the next trip you went to Boston?

A. To Boston.

Q. Then Captain Pendleton, the regular captain, took [fol. 139] charge?

A. Did not ship in Boston.

Q. What was he?

A. Chief mate.

Q. That is ordinarily called first officer?

A. The same thing.

Q. All the time from this time when you signed on you were third mate?

A. Yes, sir.

Q. On the occasion when you left Newport on March 16th, did you leave in the morning or night?

A. We left in the morning, eight or nine o'clock, thereabouts, the first part of the morning.

Q. And I think you said you had known LeVeque for some years?

A. Eight or nine.

Q. Ducos was captain of the Isabelle H?

A. I knew him for a long time. I seen him in person there.

Q. I think you said you were acquainted with him for five years?

A. I think five years.

Q. When this boat stopped the Southern Sword offshore, am I correct in my statement that you told Captain Brown not to pay any attention to phoney names because they all use different names?

A. I said that to him, yes.

Q. You say while you were third mate on the Southern Sword it never came up the Hudson River?

A. No, sir.

Q. Except on this one occasion?

A. Except on this one occasion.

Mr. Nolan: May I ask Mr. Dunigan to produce the log books of the Southern Sword which were taken by the Government at the time the ship was seized so that I may check the particular log books while the trial is going on, as to whether the Southern Sword did come up the Hudson River. We have never been given those log books. We would like to have them now. They are all here, and may [fol. 140] answer those questions I just raised.

The Court: All you had to say was, "I would like to have the Government produce the log books." That is all. That is the question.

(Discussion off the record.)

The Court: He will produce the log.

Mr. Nolan: Fine. No further questions of this witness.

Mr. Halle: No questions.

Redirect examination.

By Mr. Dunigan:

Q. Mr. Velez, listen to these names: Outside of Big Bill, Bill Red, Erickson, LeVeque, Nardone, Hoffman and Geiger, when you met LeVeque and ate with him at the Normandie Restaurant and the Belford Restaurant, were any other parties besides those persons present that you remember? Were they present when you first saw Mr. LeVeque and ate with him? Did they come in during the meal or at any time that you were with him?

A. I do not think—I am positive at no time that that cargo was——.

Q. I did not ask you that. Besides all these persons were any other persons at any time in the group that you remember?

A. No, sir.

Q. You said when you were down there these various times sometimes it would be LeVeque, Nardone and Erickson; is that correct?

A. Yes.

Q. Sometimes Hoffman would be there and others?

A. Yes, sir.

Q. When Mr. LeVeque was in and asked you the questions about any boat you answered, is that correct, as to [fol. 141] whether there should have been repairs?

A. Yes, I answered, as near as I can remember, to the best of my knowledge.

Q. When they were asking you about repairs for boats, or during the time when LeVeque and the others said that the Pronto was laid up in New London——

Mr. Gallagher: I object to the form of the question.

Mr. Dunigan: I will withdraw the question and ask this question:

Q. Who was it that said that the Pronto was laid up in New London?

A. Mr. LeVeque I heard say that, that he was towed into New London.

Q. You say in the conversation about liquor, boats, and so on, that you testified to a *moment* ago, was generally between these other parties, they would be talking between themselves?

A. Yes.

Q. When a question was asked you, you answered?

A. Yes.

Q. And at other times these other parties got up and left the table and conversed and then came back?

A. Most of the conversation they had regarding the business, they would get up from the table and have a talk and come back, just a few secret words when it was over.

Q. And when you were present the conversation they had *maonk* themselves concerning boats and liquors?

A. Yes, sir.

Mr. Dunigan: That is all.

[fol. 142] CONRAD MATHIASEN, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan:

I am the president of the Mathiasen Shipping Company, located at 15 Moore Street, New York City. I own and operate several tugboats. I know the defendant Robert Gottfried in this case (the witness indicates the defendant Gottfried). I have known him I think it is about the first of 1933.

I had called the Alco Steamship Company and nobody in the office answered the telephone. That was about twenty minutes to six. I did not know who the Alco Steamship Company was, the president or owner of it, at the time. I could not state it exactly, who was the president or vice president.

I do not know Mr. Callahan, one of the defendants in this case, Austin Callahan.

Mr. Nolan: The defendant Callahan admits that he was president of the Alco Steamship Company at the time. So we can waive those questions.

Witness Continues: About six months previous I had dealings with the *Southern Sword*. We talked or had a short talk once. She went to one of the brewers, brought the tug to Staten Island.

Cross-examination.

By Mr. Halle:

I think it was in 1933 that I knew Mr. Gottfried. The last time that I saw Mr. Gottfried personally was sometime in 1935. I cannot state that exactly. I saw him once in [fol. 143] 1933. I saw him once or twice in 1935. I did not do any business with Mr. Gottfried in 1933 or 1935. No business at all. I did not talk to him at the time in 1933 when I met him two minutes, three minutes. In 1935 I talked to him about two or three minutes.

Those two personal conversations that I had with him were the only conversations I ever had with him.

New York, December 18, 1936,
10:00 o'clock a. m.

Trial continued.

CONRAD MATHIASEN, resumed.

Redirect examination.

By Mr. Dunigan:

I testified yesterday that I had known the defendant Gottfried since 1933. During that time I never had any business dealings with him.

Mr. Dunigan: Mark these.

(Marked Government's Exhibits 51 and 52 for identification.)

(Witness shown Government's Exhibits 51 and 52 for identification and asked to examine them and state whether or not it will refresh his recollection with respect to the last question.)

I do not know if you call that a business transaction. It is two checks.

By the Court:

To explain what checks were for I will have to go into a long story so anybody will understand it; it was not for some work I did.

The checks were for a vessel which I sold from [fol. 144] the Mathiesen Shipping Company, to Wil-

liam E. Hedger, of the Hedger Steamship Company in 1933. I took a mortgage back on the vessel of Mr. Hedger in the amount of $9,000, and in my mortgage was a clause that I had to keep the vessel fully insured and the vessel was not to be rechartered to anyone else except approved by myself. Hedger went to work and I understand made some transaction as to rechartering that vessel. I would not approve of it. I understand that Mr. Gottfried was the broker in that transaction, through Mr. Hedger, and this brokerage transaction in rechartering the vessel from Mr. Hedger to the third party, which I understand they had to pay some money to Mr. Hedger to repair the vessel. It turned out I would not allow the vessel to go under this particular charter because I asked them to produce the charter to me as to who the people are, which he was not able to do. I understand that Mr. Hedger never returned the money to these people and they came back at me and insisted that I was to blame for the whole thing because if I had not objected to this charter—

The checks were given to Mr. Gottfried some time later. He came to me in 1935 as to this particular policy he had given to Mr. Hedger. In the meantime I got a judgment against Mr. Hedger in the amount of $11,000.

Two checks transaction I say I would have to explain it.

By Mr. Dunigan:

During the course of these transactions Mr. Gottfried came to my office, I would say, two or three occasions.

[fol. 145] (Marked Government's Exhibit 53 for identification.)

(Witness shown Government's Exhibit 53 for identification, and asked to examine it, the second page, and state whether or not that will refresh his recollection with respect to the last question; to which witness replied it was the truth.)

Mr. Gottfried came to my office once in 1933 after this transaction and about twice in 1935; that is the extent of his visits to my office.

I have never talked to him at other times and at other places other than my office.

With respect to that particular telephone call, I presume it was the same man, after giving me the name.

By the Court:

Witness continues: I speak to people on the telephone, I recognize the voices of the people I do business with every day. I did not recognize the voice of this particular person.

By Mr. Dunigan:

When that particular call was made the person calling stated his name.

(Witness asked to look at that page, and state whether or not it will refresh his recollection as to that voice.)

I state that the voice of the party who called on March 18 was the same voice that I heard on March 17. I do not know Mr. Gottfried's handwriting when I see it.

[fol. 146] LUDWIG MATHIASEN, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct-examination.

By Mr. Dunigan:

My present business is tugboat captain. I am a brother of the gentleman who just left the stand.

On March 17 of this year I was instructed by my brother to equip a tug and get it ready for a trip down the bay. I did get the tug out and take a man on board at Pier 5, East River, the approximate time was on March 17, that this occurred. It was either eight P. M. or nine P. M. when I was supposed to meet this man. I did not get a look at him at the time he boarded the boat; he said, "All right." I had orders what to do.

I took him to meet a boat off Red Hook. The Southern Sword is the boat I had orders to go to.

I did see the man go on board the Southern Sword. He stayed about two or three minutes and came back on the tug and I brought him back up the bay. I dropped him off at the Battery wall.

I seen the man go off. That is all. I could not place him, say who he was, or anything like that. I would not be able to recognize him now if I saw him.

I do not know Mr. Callahan, one of the defendants in this case.

I then went with my tugboat to Pier 39, North River. I saw the Southern Sword after that, she passed me while I was on the end of the pier. I did see that she went up the North River. The last I saw was up around 23rd Street. She was in close to the pier. I won't say she docked, but she [fol. 147] was close to the pier. That is the last I saw the Southern Sword that night. I saw her around 23rd Street I should say about half-past ten or eleven o'clock.

I do know the telephone number of the Mathiasen Steamship Company; Bowling Green 9-7780.

Mr. Dunigan: Mark this for identification.

(Marked Government's Exhibit 55 for identification.)

I do know my brother's home number. The number is Shore Road 8-8517.

The particular tugboat that I used to go down to the boat has a blue "M" on the stack.

It is conceded that Michael Wynn will testify that on March 17, 1936, he was a watchman assigned to duty in the vicinity of Pier 72, North River, and for some reason, legitimate or otherwise, he was unable to see what happened at the pier from nine o'clock at night to about four a. m. on March 18.

(The concession was read to the jury by the stenographer.)

JOHN A. HUNT, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan:

I am a sales representative of the New York Telephone Company and have the records pertaining to the number Bayonne 3-1726, Hoboken 3-7062, Essex 3-1119.

[fol. 148] After examining these records the subscribers are, Bayonne 3-1726, Carmine Nardone; Hoboken 3-7062, Morris Kuflek; the address on that last one is 300 Hudson

Street, Hoboken. The address for Carmine Nardone on the first one is 121 West 41st Street, Bayonne. The next one is Ralph Beetter, 34 Oakland Terrace, Newark.

GORDON H. PIKE, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan:

I am a customs agent employed by the Treasury Department, under the supervising agent, New York City. I have been in the service about 26, 27 years. March 20th of this year I went to the Belford Restaurant located at 324 West 46th Street in this city. I know the defendant Frank Nardone. I see him on the extreme left of the circle. I think his name is Nardone.

(Witness indicates Nardone.)

I saw him at this restaurant on March 20.

As to the defendant Robert Gottfried, I understand his name is Gottfried (indicating the defendant Robert Gottfried). I saw him at the restaurant on March 20. I went to this restaurant in company of some officers under Mr. Dunigan of the Alcohol Tax men, and I stood by. They interrogated certain men they found in the place. It was about noontime and I had some lunch. While I was sitting there I saw two of the men that had been interrogated—I was seated in the back of this restaurant to the right, [fol. 149] where there was a door leading to the kitchen, and I watched the men. I saw two of the men enter the washroom and toilet. One man went in twice, the second time, I should say, about ten minutes—I think it was Mr. Nardone, the man on the left, and another of the men—Mr. Gottfried went in once. The second time the man that went in first was such a short space of time—I finished my lunch and went in to look the place over. The first room was a wash basin, then a partition and a swinging door, and the second part was occupied as a toilet bowl and flush box. Mr. Gottfried and Mr. Nardone went in before me. Within five minutes I went in. In fact, one had been in and in the interim—My purpose was to go in

and look the place over. I went in and lifted the cover of the flush box and found two envelopes. Quite a few papers in both of them. I took them over and turned them over to the agent, I think Hines, who seemed to be in charge of the case at that place. Mr. Martin was along at this particular visit to the restaurant. Mr. Kozak was there, I believe. The deputy marshal was there. Mr. Hines and another agent or two. I was at the table when the papers were opened up and looked over and examined. There were a considerable number of pieces of papers. I should say probably 50 to 70. I did not count them. Some of them were thoroughly well saturated with water, some merely the edges were wet. They were not torn, saturated, soaked. The papers were not torn in pieces. Some of them were scraps. In fact, they were being destroyed. The papers that I found in the envelope consisted of some cards and scraps and addresses.

(Marked Government's Exhibits 56, 57 and 58, for identification.)

[fol. 150] (The witness was asked to examine Government's Exhibits 55, 56, 57 and 58 for identification, and to state whether or not these were included among the papers that he testified to.)

With the exception of Exhibit 58. I see a card here at the bottom. I do not recognize that; nor do I recognize this (indicating). The top paper on Exhibit 57. I recognize all the rest. That would be 56 and 55.

Mr. Dunigan: I also offer these two in evidence.

Mr. Gallagher: Objected to; no foundation laid for them, in point of time.

The Court: Why not?

Mr. Gallagher: First of all because that was a public toiler. Second, two different men were in there while under observation. Who was present? It was open for hours before. That is one thing. There is nothing to connect it with anyone or either of the defendants. I think it is unfair.

The Court: He said these two were the only ones. One went in twice and one once, and nobody else went in.

Mr. Gallagher: During the period of five minutes or so—someone went in five hours before. This is a lunchroom. People go in and use it, a public toilet. Anybody could

have done this before this. One of the two went in. You cannot convict both of them on that evidence, we say.

The Court: You could if there was a conspiracy. If there is a conspiracy, they are all bound, if they were parties to it. Step up.

[fol. 151] (The following discussion took place at the bench):

The Witness: There were two envelopes containing papers. The condition of the envelopes, it had become practically saturated with water, wet. And by reason of where they were concealed, though in place, it started to ease up, ease up from the other part, like the envelopes. The contents, the edges of some were soaked, thoroughly wet. Some of the papers I could not say definitely whether it was the top or bottom, were more wet than the ones inside. Some were practically dry.

The Court: I will take it.

Mr. Gallagher: May I be permitted to cross-examine this witness before you admit it?

The Court: No.

Mr. Gallagher: Exception.

(The following occurred in the presence of the jury):

By Mr. Dunigan:

The papers that I found in the flush bowl I turned over to Mr. Hines and Mr. Martin.

(Government's Exhibits 55 and 56 for identification received in evidence.)

I saw Mr. LeVeque at the restaurant on this occasion. I would not recognize Big Red Saunders under that name. There were other men who were interrogated and I believe taken downtown by the agents. This visit to this restaurant was not the extent of my investigation in connection with this case. I went down on the Southern Sword and took statements. (Witness is again shown Government's Exhibits 57 and 58.) 58 I recognize. The small paper on [fol. 152] 57 I recognize but cannot identify this paper (indicating). The upper one I am not sure of.

Mr. Dunigan: I will offer Exhibit 58 in evidence.

Mr. Gallagher: Same objection, if your Honor please.

The Court: Same ruling.

(Government's Exhibit 58 for identification received in evidence.)

Cross-examination.

By Mr. Gallagher:

I could not say that I do know Saunders.

Mr. Gallagher: Mr. Dunigan, have you got Saunders' photograph? I think it is in evidence, I am not sure.

Mr. Dunigan: No, it is not in evidence (handing to Mr. Gallagher).

Mr. Gallagher: Government's Exhibit 47 for identification.

Mr. Dunigan: Yes.

(Witness shown picture of Government's Exhibit 47.)

I could not be sure after seeing that picture. There were other men in the restaurant, but I could not identify him from that picture. Martin Dunigan and Kozak came in and a very short time thereafter, not over two minutes I walked in. The agents that were with me walked in first. Mr. Dunigan was not with them, as I remember. I think there were four and possibly five agents with me, and the marshal.

The Court: When you spoke about Mr. Dunigan, who are you talking about?

Mr. Gallagher: Not the United States Attorney, his brother.

[fol. 153] There were at least five or six and possibly seven Government officials there at that time when they went into that restaurant. I was practically the last one in. Five or six Government agents and the United States Marshal, with the warrant of arrest in his pocket, preceded me by about two minutes. This was before noon, I will say nearly noon. There were, I would say, four patrons that later on I recognized as patrons, not interested in the case that the agents were investigating. I do not know whether all of the defendants were arrested. I remember them being ques-

tioned and all interested in the investigation leaving. We did not discuss it that afternoon. Whether they were under arrest or not, I cannot state. When I went in I would say that three or four were being questioned or in the process of the agent walking over to them and asking them questions. Which ones I do not remember, but they were in the investigation. There were other patrons in the restaurant. Well, I think in there five, possibly only four. And this toilet that I spoke about was a public toilet, upon the same floor with the restaurant. It was back to the right of the rear, looking toward the back. Nothing intervened between the toilet and the restaurant except a doorway. I do not believe there was any door on it. There might have been a door in the wall leading into this compartment. If it was, it was always open. I doubt if there was a door on it. In the front compartment, having about half of this space, was a wash basin and then a partition or wall. I think it was a partition, and a swinging door. About two feet from the door a half door. In there there is a glass. There was a hall and vestibule and to the left was the kitchen on the extreme right of the [fol. 154] building, we will say, a doorway going into this washroom and toilet. There was an entrance from the hall adjacent to the toilet, an entrance to the kitchen next to the back of the restaurant, an entrance to the toilet. Just one entrance to this toilet. And that led from the hall, the front hall, one entrance from the hall. There were three to the hall, one from the hall to the washroom, one from the restaurant to the hall, and one from the kitchen to the hall.

I know there was one employee in the kitchen preparing meals. There was a cook and there was a lady. I think that she was the proprietor's wife, who went in and out, whether a cook or a helper in there, I am not sure.

The place consists of a small basement of a private house, the first basement floor.

The agents interrogated more than three men. I think they interrogated several. When I went in it appeared there were about two under the course of interrogation. No, I cannot state that Nardone was one of the three men being questioned at the moment. I do not think Gottfried was one of the three men questioned. I think Gottfried was seated near me, after I had placed myself at a table to the rear. I could not identify the three men being questioned because I went in there and acted as a mere looker-on at the

time. Well, I do not know whether my identity was disclosed later. I suppose they knew, possibly, who I was, but I did not disclose my identity until after the agents went out. After the agents went out I think they took certain men. I could not be sure whether they took Nardone. I think they took Gottfried. I think they did take Nardone, but I cannot be certain as they all left in one party. Whether all of them [fol. 155] were under arrest at the time or not I do not know. I think they took LeVeque. I would not say it was the last moment that Gottfried came in and was placed under arrest.

By the Court:

I could not say that he was there when I got there. I went in about two minutes after the agents and I left the place about five o'clock that evening. Well, it would be five hours at any rate, maybe five and one-half hours after I went in. I got there about half-past eleven; a quarter to twelve. As I say, I think there were three, possibly four, patrons. One man got a drink, had a beer, and he went out, and I think three sat in the back of the room, a couple and a single man.

By Mr. Gallagher:

The investigation started around half-past eleven or a quarter to twelve. No, they left much earlier than five in the afternoon. The agent left, I should judge, between two and three with the men. They all went out together. I assume they were prisoners. If I saw any walk away from the agents I wouldn't necessarily need to know where they were going. I think there were enough there. They were busy. I might become active if one of them tried to run away from the agents. I saw Nardone go to the toilet. I would say the first half hour I was there. I waited for a steak to be prepared. It might have taken ten or fifteen minutes before I was served, the first thirty-five minutes, first half hour or forty minutes. As I remember it, Nardone went in and Gottfried went in. Gottfried went in a few minutes after Nardone. Then Gottfried came out and Nardone went in again. The two trips of Nardone, I would say, were about [fol. 156] ten minutes. That is really what called my attention to it, the first man going in twice in such a short space of time. When I took these papers out, I did not flush the bowl. I did not try it. I didn't try to see if the water ran in there. I was not interested. There was water in the

bowl. No, I do not think I washed my hands in the basin. I just went in and looked around. I do not know if the bowl was able to be flushed and the water could flow in and bring anything into the sewer if there was anything there. As I recollect, the flush box was not full of water because I know I did not have to roll my sleeve up above my cuff, as I would have to do if the box had a considerable quantity of water in it, the flush box. I do say that the papers were wet. There is always that much, according to the fitting—unless it was mopped out or siphoned out.

By the Court:

It was a regular toilet, flush box, and you pull a little lever which lets the water out of the flush box. There is a certain amount of water in the bowl. Of course, there is a roller and the fitting comes up half an inch. It was in the flush box, in the tank, not in the bowl.

By Mr. Gallagher:

I found those in the tank, the container for the water, the flush bowl.

A Juror: That is altogether different. I did not understand that.

Q. We do not know about it.

The Court: You tell them what it is.

The Witness: Behind it, on the wall.

[fol. 157] A Juror: I understand now. I did not understand before.

I did not try the water to see whether it could flush down. This flush tank is not against the wall. It is porcelain. Porcelain, some kind of pressed paper with a porcelain top. That fits on the flush tank. I think there was a space behind that, between that and the wall, but it is very small. There was in this particular instance some space between the top and the wall, between the box and the wall. I think there was. The covering of the box would be just the same as the box itself.

By the Court:

The cover was on. I left the cover off. It is three-quarters of an inch. One was bigger than the other. The

other as I remember, would be a little thinner, maybe three-eighths of an inch.

By Mr. Gallagher:

I was seated in the restaurant while observing this. I think the end table on the southwest corner. That is the corner in the back room nearest the door leading to the hall, which you can use as an entrance to the washroom and to the kitchen and the washroom. Prior to that time there was the marshal in there and three or four people. Four, five or six agents and the marshal in there and three or four people. I was not paying much attention to them. They were not interrogating them in the space between where I was sitting and the hall and toilet. They were toward the forward part of the store and some of the men were seated at tables which would be practically behind me. When Nardone went to the toilet he did not go in the [fol. 158] custody of one of these agents. I doubt if two of them could get in the space at the same time. The toilet itself is just a little toilet with a swinging door in front of it. The swinging door is inside and hidden, while the so-called cubby-hole or compartment—It is possible that when Nardone went to the toilet that an agent went with him right to that door. The marshal or agent might have gone along with him to the door and had him in his custody from the time that he went in there and placed his hand on Nardone until he brought Nardone downtown. He did not go inside. I do not believe he could.

I have been in the service about 27—26 years.

I do not think there was any door on the outside, just a doorway on the outside.

Cross-examination.

By Mr. Halle:

I noticed someone come in after the agents had already come to the place and I heard after it was Gottfried, on the 16th, after that, I could not say absolutely, I presume someone accompanied Gottfried to the toilet. I could not say. I do not know whether Gottfried was arrested that day or not.

WALTER F. MARTIN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan:

I am an investigator of the Alcohol Tax Unit. I have [fol. 159] been an investigator since 1929. I know the defendant Frank Nardone and the defendant Pierre LeVeque and the defendant Robert Gottfried, and Austin Callahan, and Hugh Brown. I know a man by the name of George Geiger. I know Big Red Saunders. I first saw Nardone at the restaurant on West 46th Street, at the Belford Restaurant, 324 West 46th Street. I first saw him there on February 12 of this year. I saw him there on other occasions after February 12. I was assigned to keep a watch on that restaurant daily, and I was in the neighborhood of the restaurant usually from around eleven o'clock until five or six in the evening, and I saw Nardone and LeVeque and others going in and out of the restaurant practically every day. One or two days I did not see them, but practically every day they were in sometime. Saunders was there. Big Red Saunders. Geiger was there practically every day. Another man that is known to me as Hoffman and is not here, he was known to me as Hoffman. And Gottfried was there on several occasions and there were others that I do not recognize that did not later come into the case, so I do not know much about them. They would stay as much as—the longest time I saw them there was five hours. The shortest time was an occasion when LeVeque was there about forty minutes and Nardone came up in his car and he and LeVeque left about ten minutes thereafter and drove away in Nardone's car. Nardone had his car there almost every day. Geiger and Saunders and the others sometimes drove away in Nardone's car.

I had an opportunity to observe what they were doing during this time that they were there and they were usually [fol. 160] seated at a table in the corner of the restaurant in the back, on the left, talking together. I did not see them eating. On one occasion they had some wine in front of them. They were in conversation around this table I observed their activities at the restaurant practically up to

March 20. That would cover the period from February 12 to March 20. I parked my car outside the restaurant. My car had a Virginia license on it. On March 20 I went up to the restaurant, accompanied by Investigator Kozak; Investigator Hines and Customs Agent Pike, who was just on the stand. There was also a police officer named Arlington; a United States marshal; I believe his name was Gibson, and an investigator named Goin, G-o-i-n, in the crowd. When I arrived at the restaurant. I saw Nardone and LeVeque, Geiger and Red Saunders and Velez there. That is the gentleman who testified yesterday. I did talk to some of these men that I have just named at the restaurant. I did not question them personally. I just made one or two passing remarks. My particular job in connection with that raid was to take charge of the evidence as it was turned over to me, such statements as they would make and such statements as were taken from them were put in envelopes and given to me. I had an opportunity to observe Nardone going into the washroom or toilet room. We had been in there about five minutes. As a matter of fact had not had time to search anybody for papers or documents. Someone was being questioned. Nardone asked if he could go to the toilet, and I told the United States [fol. 161] Marshal to take him to the toilet. The United States Marshal went to the door and let Nardone go in. There was no exit to the toilet. The United States Marshal looked in first, and he stood aside and let Nardone go in behind the little swinging door, and he watched until he came out, and Nardone came back and sat down at his original table.

At that time no search had been made of Nardone personally. I think they searched Saunders first and they were questioning Saunders. He was the first searched. The rest of the prisoners were sitting waiting their turn to be searched and questioned. We had been there about six or seven minutes when Gottfried came in. He started across to the table where these other men were seated and he saw that there was something wrong, took a look, and he went across and sat on the other side of the room.

We were there about an hour or so questioning these men and searching them. While we were there I saw Saunders taking something from his pocket and slide it down by the seat in front. I saw LeVeque fumble in his pocket and ap-

parently drop something. When it came his turn he moved up front to be questioned. There was found beside his chair some papers. There was found beside Saunders' chair a wallet and a notebook and also some papers.

I saw Gottfried go into this toilet room only once after Nardone went in the first time. At the time no search had been made of Gottfried at all.

I heard Customs Agent Pike testify about some papers he [fol. 162] turned over to me. Government's Exhibit 57 for identification are two pieces that were turned over to me by Agent Pike at the time.

(Government's Exhibit 57 for identification offered in evidence.)

Mr. Gallagher: I object. First, this is an attempt to impeach his own witness. Agent Pike says he does not remember it.

The Court: He said he turned over a number of papers to Mr. Martin. I do not remember any particular paper, that particular paper. That is the one that he turned over to Martin at the time, is that right?

The Witness: Yes, sir.

The Court: By Pike?

The Witness: 57 papers altogether.

The Court: What is the difference? He might not remember that is the 57 papers, if he handed him two envelopes with 57 papers in them.

Mr. Gallagher: He might not remember the 57 papers. If he wants to use any paper, he should take it out.

The Court: No. The rule of evidence is that if somebody turns over to you 57 papers within the time and they turn over two envelopes and you receive them and you say, "Well, that is one of the 57 that I got," that would be admissible in evidence.

Mr. Gallagher: I object on the ground already stated. With reference to the other exhibit, I think it is incom- [fol. 163] petent, irrelevant and immaterial, not binding on the defendant, no proper foundation laid for the evidence.

The Court: Mark it in evidence.

Mr. Gallagher: Exception.

(Government's Exhibit 57 for identification received in evidence.)

Nardone went in there twice. Government's Exhibits 55, 56, 57 and 58 were included in the papers turned over to me by Agent Pike at the time.

During the time I was in the restaurant when I said Nardone and Gottfried were in the toilet, I did not see any other people go into the toilet during that period. I had it under observation.

(Marked Government's Exhibits 59, 60, and 61 for identification.)

I went into the restaurant to get a glass of beer. Nardone and LeVeque were at the back table where they usually were. And the proprietor of the restaurant spoke in French to LeVeque. I do not know what he said. But Nardone immediately went out of the restaurant and walked up the street, passed my car, and looked directly at it and walked very slowly and he crossed over the street and walked down the opposite side, while watching my car very carefully. That was, I think, on March 1. When I was in the restaurant at the time I saw a piece of paper on the bar, back side of the bar, with my license number on it, Virginia 186404.

A moment ago I said that the first time that I watched this restaurant I saw Nardone and LeVeque there on February 12.

[fol. 164] Government's Exhibits 59, 60 and 61 for identification. I have seen those before among the others picked up at the side of LeVeque's chair, when he moved up to the front of the saloon to be questioned. They were just folded together like that (indicating). Folded, alongside the chair. This is on March 20.

Mr. Dunigan: I offer them in evidence.

Mr. Gallagher: Objected to on the grounds already interposed with reference to the other exhibits, more particularly on the ground that this is an open, public restaurant.

The Court: I do not understand the grounds as to the other exhibits. What has that got to do with your objection? He says he found these alongside the chair.

Mr. Gallagher: They are incompetent, immaterial and irrelevant.

The Court: That means nothing unless you tell me.

Mr. Gallagher: If you will permit me.

The Court: Yes.

Mr. Gallagher: They are incompetent because they were found in a public restaurant on the floor where there were a great many patrons coming in and out and at the time there were five or six patrons.

The Court: That is not the fact. He said a man and a woman were in one place and another man came in to have a drink. There is no evidence that there were six.

Mr. Gallagher: I submit it is a public place and there is [fol. 165] evidence that there was one other person in that place not connected with this case.

The Court: Overruled.

Mr. Gallagher: Exception.

(Government's Exhibits 59, 60 and 61 for identification received in evidence.)

Mr. Dunigan: Mark these.

(Marked Government's Exhibits 62 and 63 for identification.)

I examined all the papers that Agent Pike turned over to me. I made a list of what they were and what they were supposed to be. I do not have that list with me now but I recall some of the papers. I think I could testify in part without the list.

Mr. Gallagher: May I respectfully submit that the testimony is with reference to a document that is in existence. I object upon the ground that it is secondary evidence. The document is the best evidence.

The Court: They will have to be produced; there is no question about that.

Mr. Dunigan: We will come to that in a moment.

One piece of paper among these was a warehouse receipt from William H. Strang Warehouse with reference to some storage charges in Mr. Gottfried's name. All the papers that are not included there were turned over to me separately by Mr. William E. Dunigan at the office who later returned them to the defendant, Gottfried.

The Court: You might now testify as to other points.

Witness continues: There were two promissory notes [fol. 166] from the Madison Small Loan Company, and two from another small loan company. Both of them had the names of Mr. and Mrs. Robert Gottfried. There was an elec-

tric light bill in the name of Mrs. Gottfried and a few cards with telephone numbers on them. I do not recall what they were. And pieces of envelope with notations which apparently were not of any value to us in the investigation. I did not make any special note of them. And there were at least seven or eight pieces of paper that were apparently the private papers of Mr. Gottfried in connection with his home, his lights, and so forth. Those are the pieces that were returned to Mr. Gottfried. Government's Exhibits 62 and 63 for identification are recognized by me.

I was present when the defendant Callahan was questioned by others at the Sub-Treasury Building. I observed him write on a piece of paper. The top line on Government's Exhibit 63 is Callahan's handwriting.

The Court: What else is on it?

Witness continues: "They know where I am." On Exhibit 62 the first four lines are in his handwriting. The first line reads, "Nyack 301"; the second one is "Nyack 453"; the third line, "They know where"; and the fourth line, "I am." When Mr. Callahan did that writing my superior, Mr. W. E. Dunigan, Commander Yandel of the United States Coast Guard Service, and myself, were present.

(Government's Exhibits 62 and 63 for identification received in evidence.)

Government's Exhibit 58 is Mr. Callahan's writing.

[fol. 167] Cross-examination.

By Mr. Gallagher:

By referring to my notes I can give you the exact date that I saw Nardone when he went out of the restaurant and looked at my car.

Short recess.

I saw him go and look at my car on March 2. The restaurant is on the ground floor of a former private house. In the forward part, I believe there were two or three small tables on the left—on the right, as I remember. In the rear I believe there are three tables on each side. They are tables that usually seat about four people. About eight or nine tables seating four people is right. I had the place under observation from February 12. Up to the time of the

arrest. More particularly from February 12 daily up to the March 2nd. I would say the trade was small.

On occasions when I was there there would be about—not more than seven or so people eating at one time.

It is between 8th and 9th Avenues. The times I was in, sometimes would be during the lunch hours; sometimes later in the afternoon, about 2:30, 3 or possibly 4 o'clock. Each time I went to the restaurant I went in my car. I usually drove my car in that neighborhood. My car had a Virginia license. I did not drive my car in the vicinity of the front of the restaurant, but somewhere in the same block.

On one occasion that I was in there, from February 12th [fol. 168] up to March 1st or 2nd, I did not see anyone there. With the exception of that one occasion, some of the defendants were there each time. I did not see Nardone there every time, but practically every time. Sometimes he would miss a day.

I saw LeVeque there practically every day. During the times that I went there, with the exception of the absentees, they were there on some visits. I do not know, socially, any of the ones who were in the restaurant. When I started watching the restaurant, I did not know one from the other. On March 2nd I did not socially meet anybody who was a patron of the restaurant. There were a few customers that would drop in and stay five to ten minutes. I would judge those to be wine or beer customers, and I paid very little attention to them. They were usually the same people, the ones whom I saw drop in occasionally for a drink were fairly regular. From February 12 to March 2 I was fairly familiar with the ones who had been going in there during that period, by sight. There were strangers, however, a few strangers.

I had a Ford car, a two-door sedan, light green. Easy to see. I do not know whether it was attractive. I have decided it is not a very good color. It gets dirty too easy. It could be seen by anyone during that period from February 12 to March 2. Quite a few of that color around the street. A great many parked cars of that color there. I do not know whether they were parked right there. This is not a special paint job on that Ford, green color; thousands of them. There are not a great number of them on a particular street with a Virginia license number. On one occasion I [fol. 169] did try to unlock another man's car by mistake, thinking it was mine. It did not have a Virginia license;

it had a New York license. Between February 19 and March 2, I do not recall that I observed on that block any other green cars with Virginia license numbers. I do not know that March 2 was the first time that he went to see what kind of car I had. That is the first time I observed him looking at my car.

Gibson is the name of the marshal who accompanied Mr. Nardone to the toilet; connected with the Southern District. He was with me on that day. He was the marshal who had the warrants of arrest. I was not instrumental in obtaining and procuring the warrants of arrest before they were delivered to that marshal. I do not know who made the affidavits for the warrants. I do not know if it was a United States Commissioner's warrant. I am under the impression it was from the South Carolina court, after his indictment on the removal proceeding. I think I know there was a warrant for Nardone. I knew this marshal had a warrant for Nardone. I do not know what name was on it. I did not see the warrant. And my associates and myself went that day to that restaurant and assisted in the arrest of several men for whom warrants had been issued. And the man who had the warrant is the man who accompanied Nardone to the toilet. There was a warrant for the arrest of Saunders, and a warrant for the arrest of LeVeque. There was no warrant for the arrest of Gottfried. Gottfried was not arrested that day. He was notified to come in to us, to the Sub-Treasury Building, for questioning. Nothing would have happened if he had refused the invitation. After he accepted the invitation, he was not [fol. 170] placed under arrest. I think he was arrested—he was not arrested on that for the indictment that was returned, if I remember correctly.

Mr. Halle: Yes, I know. As a matter of fact, he never was arrested.

The Court: Was he arrested?

Mr. Halle: He surrendered himself.

The Court: He is arrested, because he is on trial.

Mr. Halle: He came in voluntarily.

Mr. Dunigan: I would like to state the defendant, Gottfried, appeared after negotiations between his counsel and myself and the Court, when the indictment appeared on the calendar of the Court.

Cross-examination.

By Mr. Haile:

Mr. Gottfried was not arrested that day, and on a number of occasions after that Gottfried was requested to come down for further questioning from time to time, and he always came so far as I know voluntarily. I told him to come down at a certain time and he came and we questioned him further, and he came again and so on. He came down when requested. That is all.

Redirect examination.

By Mr. Dunigan:

The occasion when I saw Nardone looking at the car, was on the same day when I saw the license number of the piece [fol. 171] of paper on the bar. I walked up to the bar and ordered my beer, and Edmond Parrot, who testified yesterday, served my drink. He spoke in French immediately to LeVeque and immediately thereafter Nardone went out. I drank my beer and went out to the car. It was then that I observed Nardone looking at the car.

On March 20, up at this restaurant, I remained there some time and questioned these persons that we have been talking about, looking at these papers and so on.

EBEN BABBIDGE, recalled:

Direct examination.

By Mr. Dunigan:

I testified yesterday that when I left Newport News, Captain Brown was in charge of the Southern Sword. Captain Pendleton had been off practically all the time I was on the ship. He was in charge of the ship when I left Boston and went to Newport. I accompanied the boat from this Pier 72 to Bridgeport. Captain Pendleton was put in charge of the boat when he came back.

William J. Geary, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan:

I am a customs inspector for about 16 years.

On March 21 of this year I was assigned with others to search the ship, Southern Sword, and found the ship's log. [fol. 172] Several engineers' log books were found, and a chart showing the sea course from Halifax to Haiti. The course is laid out on the chart. I have the chart here.

(Witness produces.)

(Marked Government's Exhibit 64 for identification.)

This is the chart. It was found in the chart house.

Mr. Dunigan: I will offer it in evidence.

Mr. Nolan: May I ask what it is?

Mr. Dunigan: Yes.

Mr. Nolan: I do not see what it has to do with this. I will have to object to that. It is incompetent.

The Court: I do not know if it is.

Mr. Dunigan: I will bring it out, if it is admitted in evidence.

Mr. Nolan: Objected to as incompetent, irrelevant and immaterial.

The Court: I will take it subject to a motion to strike out if not connected.

Mr. Nolan: Exception.

(Government's Exhibit 64 for identification received in evidence.)

Government's Exhibit 64 in evidence, with reference to these circles and pencil notations with the written words, "Winter Quarter Lightship," were on there when I found this on the Southern Sword. I have added no marks.

This is the ship's log, not the engineer's log (handing to Mr. Dunigan).

Mr. Dunigan: I do not propose to offer this myself; I am producing it. I will offer it in evidence if you want me to. I have nothing to ask.

Mr. Nolan: May I ask him some questions.

[fol. 173] Cross-examination.

By Mr. Nolan:

Q. Did you have a search warrant when you went on the Southern Sword?

A. No, it is not required.

Mr. Nolan: I ask that the log be returned to me as attorney for the Alco Steamship Company.

The Court: I do not know about that on this application. The log is offered in evidence.

Mr. Dunigan: Yes.

Mr. Nolan: I take the same objection.

The Court: What is it?

Mr. Nolan: Incompetent, irrelevant and immaterial; very improper.

The Court: Why incompetent, irrelevant, immaterial and improper?

Mr. Nolan: As to the defendant Callahan and Brown because the entries in the log book have not been proved who wrote them. Further upon the ground that they have nothing to do with it.

The Court: I understand that Captain Brown was in charge on the trip. It is the log book.

Mr. Nolan: I think they will have to prove who wrote that log book and when it was written up.

Mr. Dunigan: I withdraw the offer. I have not asked for it. Mr. Nolan, yesterday, asked for it, for whatever it is worth.

Mr. Nolan: I ask the Court's permission to have the log books to look at them at my convenience.

The Court: Certainly you may.

Mr. Dunigan: Mark this paper.

(Marked Government's Exhibit 65 for identification.)

Mr. Dunigan: That is all. New York Telephone Company man.

[fol. 174] ALFRED H. SELLIS, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan;

I am an employee of the New York Telephone Company, and have the records pertaining to the following numbers: Drydock 4-6284. The subscriber is, the initial is C, the last name is Nardone, N-a-r-d-o-n-e, 165 Mott Street. Longacre 5-7994. The subscriber for that number is Edmond Parrot, P-a-r-r-o-t, 324 West 46 Street. Trafalgar 7-7376; the subscriber and address for that one is Pierre LeVeque, 65 Central Park West. Susquehanna 7-7467 is in the estate of the George B. Leonard Holding Company. The agent is Potter Hamilton Company. The address of that Holding Company is 65 Central Park West. Wisconsin 7-1351; that is in the name of Louis Halle, 152 West 42 Street. Wisconsin 7-9165; that is in the name of Frank J. Cosgrove, 152 West 42 Street. Buckminister 2-7608; Nathan W. Hoffman, 221 Linden Boulevard, Brooklyn. Shore Road 5-7564; that is in the name of Theodore Erickson, 6816 Bay Cliff Terrace, Brooklyn. Hanover 2-7949; Alco Steamship Lines, Incorporated, 50 Broad Street, Manhattan. Nyack 301; I have an application, but the number was changed from that number. The number is Nyack 1199, formerly Nyack 301, in the name of Austin L. Callahan. 1199 present number, former number 301. The number was changed from 301 to the other on May 29, this year, 1936. Shore Road 8-8514; D. F. Devine, 8718 Ridge Boulevard, Brooklyn. Bowling Green 9-7780; that is in the name of the Madison Towing Line, Inc., 11 Moore Street, Manhattan.

[fol. 175] JOHN PICARELLI, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan:

I am an investigator of the Alcohol Tax Unit for five years. I know the defendant, Frank Nardone, since March

21, 1936. I saw him on that day at United States Commissioner's office at this building. I have seen him since that time possibly eight or nine times. I had no conversations with him on March 20. I did not talk to him on March 20. I did not talk to him since that time, except just to say, "Good Morning." I did hear him talk at the United States Commissioner's office just for a minute or so. I saw him on the witness stand. I do not think he had anything to say the time I was there.

I did not testify that time, on June 29. I did testify at other times in the Commissioner's office, with respect to Nardone. On that particular occasion I recall his testifying. I recognized his voice. I have heard his voice over the telephone during the months of January, February and March of this year. I was listening to conversations over a tapped wire. And the telephone that was under observation was Drydock 4-6284. I was present when the man from the New York Telephone Company testified that that number was in the name of the subscriber, C. Nardone at 165 Mott Street. I was listening over this wire each day for a period of approximately 8½ to 9 hours a day from January 2 until April 6, 1936. During that time I listened to over 500 conversations. While the conversation was going on I made notes of what was said. After the conversation was finished [fol. 176] I would immediately rewrite the message in longhand on a piece of paper. After I transcribed it in longhand on the paper I mailed it to my supervisor. I speak Italian, and understand Italian when I hear it.

(Marked Government's Exhibit 66 for identification.)

When a call from the outside came on this particular number, I would describe that as an incoming voice, coming into Drydock 4-6284. If a call was made from the number or a person talked from that number I would call that the out voice. Looking at Government's Exhibit No. 66 for identification, when I first started on the wire, I remember the first call that I heard, No. 1. It was a normal conversation, of no consequence.

Q. I ask you to examine Call No. 3, and tell us about that call.

Mr. Gallagher: If he is going to divulge the contents of telephone communications, before he answers this question

I want to enter an objection on the ground it is in violation of the Communications Act, Title 47, United States Code.

The Court: I think this kind of testimony is admissible. It has been so held by the courts.

Mr. Gallagher: Exception.

The Court: That is my ruling.

Mr. Gallagher: May I further have an opportunity to cross-examine this witness, first, on the question of what he knows about that voice, the conversation or the words used [fol. 177] at the time which he is now to testify to.

The Court: I will let you examine him summarily.

By Mr. Gallagher:

On January 3, 1936, I heard a voice over a telephone wire. At the time, on that date, I did not know who the owner of the voice was. After that information which I and other Government agents received over the telephone wires, I appeared before the Grand Jury of South Carolina, and gave testimony about conversations heard over the telephone wires relative——

The Court: I won't let him say what he said before the Grand Jury.

Witness: I gave testimony.

The Court: That is all he will say.

Witness: Before that Grand Jury.

At the time I did not know the owner of that voice that I am now about to describe.

Q. I did not ask that. I ask, did you know the owner of the voice?

The Court: Do you know whose voice it was?

The Witness: Yes, sir.

Q. Did you know the individual in person?

A. Yes, sir.

Q. Did you ever meet that individual in person before that date?

A. Yes, sir.

Q. Were there two voices on that wire?

A. Yes, sir, outgoing and incoming.

The Court: What?

The Witness: Outgoing and incoming.

[fol. 178] Q. Did you meet both of those individuals before that date?

A. No, sir.

Q. One of those individuals you had not met?

A. That is right.

Q. The one individual whom you knew, was he indicted in South Carolina?

A. Yes, sir.

The Court: What is his name?

The Witness: Frank Nardone, I presume.

I did say in January I did not know Frank Nardone. I also said that the first time I met Frank Nardone was March 21. I also stated that was the first time I identified Frank Nardone with the voice that I had heard over the wire. It wasn't before March 21 that I first appeared before the Grand Jury in South Carolina. One of the witnesses here stated that the arrest was made on the removal proceedings on a warrant issued out of South Carolina. If other agents appeared in South Carolina on the first indictment, I do not know. I was not present at the time.

I know Mr. Kozak and Mr. Martin, I do not know whether they appeared before the Grand Jury in South Carolina prior to the time that I went there. I do not know. At the time I was out of town. I do not know what they done.

Somebody told me that the agents went down, but who the agents were, I do not know.

An indictment was found in South Carolina. I do not know about that date. There was an indictment found. As the result of that indictment a removal proceeding was commenced in New York. And as the result of the removal proceeding a warrant of arrest was issued.

[fol. 179] The Court: Are you examining him preliminarily?

Mr. Gallagher: I am going into that.

Mr. Dunigan: I think I can save a little time. I will concede that there were two proceedings before the Grand Jury in South Carolina, two separate indictments voted on two separate dates.

Mr. Gallagher: Just a little bit more.

Witness: On March 21, 1936, when I stated that I met Nardone for the first time, there was in existence an indict-

ment in South Carolina upon which a warrant of arrest had been issued. And the defendant was arrested as a result of that indictment. While he was under arrest in the Commissioner's office, I did not say I spoke to him.

I heard him being interrogated by other officers. I also heard him talk with a man whom I knew to be Mr. Jarshower, an attorney.

The Court: What is his name?

The Witness: Jarshower.

I did not hear him being interrogated by other officers while he was under arrest at the time. This was before the Commissioner. That is right. It was an arraignment. He was being arraigned. He was under arrest. And he was asked his name and his address; I suppose all those questions. And his answers on the arraignment I listened to. And then, for the first time, I knew that was Frank Nardone. He was brought in on March 2. I do not know whether he was present when I arrived at the Commissioner's office. [fol. 180] He was in the Commissioner's office before. And then I went to South Carolina and gave my testimony. As a result of which a superseding indictment was issued, I think that is it.

The Court: He cannot tell whether it was a result of his testimony. That is a conclusion. He cannot tell what happened before the Grand Jury. I won't permit it.

Q. Was a new indictment issued? A. I think so.

Q. Out of the same case?

The Court: I won't let him tell what happened before the Grand Jury.

Mr. Gallagher: I am not asking for that testimony.

The Court: You are not going to show anything about the South Carolina case, what they testified, what happened before a Grand Jury. That is what you are asking him to do. You will not accomplish that.

Mr. Dunigan: I think he should confine his examination to just the witness's identification of the voice.

The Court: That is the only purpose of a preliminary cross-examination. I won't allow you to go ahead. You have gone further than you should have. Go ahead with the preliminary examination.

Mr. Gallagher: May I object to any testimony being offered with reference to any telephone conversations on that ground, that no identity of the voice is shown, no identity [fol. 181] made, but it is an invasion of the rights of this defendant, in violation of the fourth and fifth amendments to the Constitution, that he was under restraint, imprisoned and they obtained that testimony and obtained that information as a result of that arrest.

The Court: Overruled.

Mr. Gallagher: Exception.

By Mr. Dunigan:

Call No. 3 is an outgoing call at 106.

(Discussion at the bench.)

The Court: I regard the bail as very small at this stage of the trial. I am not inclined to allow them to go on bail unless the United States Attorney consents.

Mr. Dunigan: The United States Attorney will not consent.

Mr. Halle: Gottfried was not arrested. They had him for about two months and interrogated him. He always appeared. And then when he was advised of an indictment he came down voluntarily and appeared. He always appeared. I will pledge my word to the Court that he will be here.

The Court: No, they are remanded.

Mr. Gallagher: May I submit one other fact: There is an indictment in South Carolina. He is under bail under that as well.

The Court: They are all remanded.

Mr. Gallagher: Won't you fix some bail?

The Court: No, they are remanded.

Adjourned to Monday, December 21, 1936, at 10:30 A. M.

[fol. 182] New York, December 21, 1936, 10:30 A. M.

Trial resumed.

(The following discussion took place at the bench, without the hearing of the jury:)

COLLOQUY

Mr. Gallagher: I request an opportunity to examine this witness, in addition to his ability and credibility, what methods were used in tapping these wires, where, the manner and how the wires were tapped.

The Court: That has nothing to do with it. You can get that on cross-examination.

Mr. Gallagher: As to whether it should be admitted in evidence and whether it should be permitted as to these defendants.

Mr. Dunigan: He recognized the voice. That is all.

Mr. Gallagher: Preliminary to their going into evidence.

The Court: I let you examine him as to whether he recognized the voice and told you to reserve examination until later. In the meantime, have you got these two hundred odd telephone messages?

Mr. Dunigan: They are in these conversations.

The Court: You cannot read any two hundred of them.

Mr. Dunigan: No, special ones.

The Court: Have you got these 200 messages?

Mr. Dunigan: We have to select them out now.

[fol. 183] Mr. Gallagher: Is the United States Attorney going to offer them in evidence, transcripts of the men who intercepted the messages and heard these defendants? Before he makes the offer, I wish to make a preliminary objection to the offer and go into the question of whether or not they should be admitted into evidence. All of them by this witness from the witness stand.

The Court: Apparently you examined him on the question of identity of voice. As to his ability to do that.

Mr. Gallagher: We need time.

Mr. Halle: His ability to take it down.

Mr. Gallagher: And question him as to whether or not the transcript is finished and more particularly if it is taken completely; whether or not the transcript of the testimony is complete. Assume, for the sake of argument that he heard over the wire a man state, "Yes, I will do that," in the message, I have no doubt that——

The Court: That is the proper subject of cross-examination, but not preliminary examination. Now, examine him, if you want to, on the question of the owner and identity of the voice. I am not limiting you.

Mr. Gallagher: My point is this: If the messages go into evidence through an exhibit that has been offered, it will be taken as binding.

The Court: They will have to consent to matter instead of having the witness testify as to each statement. That [fol. 184] will be a matter of consent, instead of the witness testifying in detail to this statement.

Mr. Gallagher: That might be possible.

The Court: If you want an agreement as to any particular message, you must do that.

Mr. Halle: A long conversation of a man, there is the question of his ability to take such a long conversation down.

The Court: You can do anything you want while on cross-examination. I will pass on the issue. Do you want to examine him now as to whether he identified these voices?

Mr. Gallagher: He has already testified that he did identify the voices and he did not know whose voice it was at the time he heard it, but on March 21st in the Commissioner's office he recognized the voice as belonging to this defendant.

The Court: That will be taken care of by the Court properly. I am speaking *now* about over the telephone and his ability to say it is you; that he *met you subsequently* and heard your voice and this is the man that was talking to you. That is a question of fact. Do you want to examine *him* about that?

Mr. Halle: Not about the voice, his *ability*. Naturally Mr. Dunigan had the number of Mr. Callahan's office identified by the witness. Are you going to ask him to testify to anything concerning the telephone *conversations of Callahan* or at his office prior to the 17th day of March?

Mr. Dunigan: I cannot say that right offhand, what con- [fol. 185] versations I had with Callahan's office. I will have to check on that.

Mr. Halle: Can you show me something as to that? We might save some time.

The Court: Where is that book? It would probably be easier to take that out.

Mr. Dunigan: They are all numbered, 82, 112, and I have the numbers of anything I use.

The Court: Read the numbers into evidence and page so and so. Is that what you mean?

Mr. Dunigan: No. You can take these out.

Mr. Gallagher: I submit that if Mr. Dunigan has 350 pages of transcripts of telephone messages and he intends to offer in evidence a lesser number than that—if he has 504 and he intends to offer any less number than 504, we should have the right to scrutinize each and every one.

The Court: Put them all in.

Mr. Gallagher: I do not want him to offer any. If he is offering any, and if the Court——

The Court: You can look at them all. That is the better way. I will say that so far as I am concerned I do not regard very many of them as material to the issues.

Mr. Gallagher: He might have one message that he might consider material and if he put in the following page, it might correct itself.

The Court: You can look at the whole thing.

Mr. Dunigan: I am perfectly willing to let them see them, [fol. 186] but not let them go out.

Mr. Gallagher: I will say for the purposes of the record, that not on the question of convenience, but on the question of the defense I am objecting to any message going in that does not implicate any defendant.

The Court: You are offering in evidence these 504?

Mr. Dunigan: I prefer to offer the ones I have picked out. For the purpose of the case, the jury has got to know the contents of them.

The Court: 504?

Mr. Dunigan: No, 231 out of these 504 which the witness on the stand now would testify to. I have selected 72 out of 504. 700 wire taps were made.

The Court: How many has this witness?

Mr. Dunigan: 72.

The Court: Offer everything in evidence now. What is the objection to the 512? As a matter of fact and as a matter of convenience we will let the witness testify to each item he has read out to refresh his recollection simply on the question of convenience, without waiving your rights or any other reason.

Mr. Gallagher: On behalf of all defendants—I assume I may act for all of them.

The Court: Yes.

Mr. Gallagher: I strenuously oppose any messages of any kind that are offered in evidence; object to the introduction of the statement in evidence, until a preliminary examination shows the witness' qualifications. The Court, [fol. 187] I assume, is going to reserve decision until after the motion is made as to the evidence. We will stipulate that if the Court overrules us he will grant us an exception for the benefit of an appeal and the protection of our rights. The Court then orders that the witness be directed to answer on each and every telephone conversation; that he would testify as to 72.

The Court: This may be offered in evidence as a matter of convenience, in lieu of his testimony, without waiving any of your rights.

Mr. Dunigan: When is the jury going to know about that?

The Court: You can read them now.

Mr. Gallagher: That he would testify as to the 72 or 73 messages.

The Court: 72.

Mr. Gallagher: 72 that Mr. Dunigan has reference to, similar to the transcript contained in the record here.

The Court: All your objections are overruled. You won't object upon that ground. They may come in on the question of convenience, and I will reserve the objections.

Mr. Nolan: Exception noted each time?

The Court: Yes.

Mr. Gallagher: On the right to examine and cross-examine.

The Court: I will give you that right. Select the 72.

(The proceedings were resumed in the hearing of the jury as follows):

The Court: There are a number of telephone messages. 72, I think, are being offered in evidence at this time as the [fol. 188] part that this witness will testify to. It is stipulated that he would testify to them, as a matter of convenience, rather than having the witness testify as to each of these items, that they be marked, but defendants deny they had anything to do with it. The stipulation is simply a matter of legal convenience. These 72 are referred to as Exhibit 66-A. I think the stenographer should copy in later the dates of each of these. Maybe you could leave the dates off, the 72 off.

Mr. Dunigan: We have about selected them now. May I come up?

(Discussion at the bench, off the record.)

(The following discussion at the bench, without the hearing of the jury — as follows:)

Mr. Dunigan: These calls have been marked. We want to be perfectly fair about it. There will be certain things which may stand out by reason of the marking.

The Court: What difference does it make?

Mr. Dunigan: It does not make any.

The Court: He could testify as to a blue mark on it.

Mr. Dunigan: It was done by some superior in his office.

The Court: Take a look at them and see what you think about it.

Mr. Dunigan: Some of them are and some are not marked (handing to defendants' counsel).

Mr. Halle: We do not care about the blue and red pencil marks.

[fol. 189] The Court: Let the record show that these marks are not to be considered as marks. They were put in in the course of preparation of the case. Is that satisfactory?

The Witness: The supervisor put them in.

The Court: There are 72 exactly?

Mr. Dunigan: Yes, sir.

(The proceedings were resumed within the hearing of the jury, as follows:)

The Court: These 72 telephone conversations which are marked Exhibit 66-A, on some of them you will find an underlining. That does not mean anything. That was done in the course of examination by some of the Government officials, who did that. You are not to consider the blue or red marks. That has nothing to do with it. I do not know whether there are any other colors besides red or blue, but you are not to consider the underscoring.

(Marked Government's Exhibit 66-A.)

The Court: There are 66 here?

Mr. Dunigan: 72 here.

The Court: 72 in Exhibit 66-A. How many in Exhibit 66? Make those available to the defendants' counsel.

Mr. Dunigan: All these (indicating)?
The Court: Yes.

(Papers handed to Mr. Halle by Mr. Dunigan.)

[fol. 190] JOHN PICARELLI, resumed, having been previously duly sworn, testified further as follows:

Direct examination (continued).

By Mr. Dunigan:

Q. Mr. Picarelli, I show you Government's Exhibit 66-A in evidence, and ask you whether or not you intercepted those calls?

Mr. Gallagher: I note it is a part of the record. I would like for the jury to know that we strenuously object to any of this testimony being offered.

The Court: Yes. I told the jury it was simply a matter of legal convenience. You object and deny any connection of the defendants with it. I told them that. I thought you heard it.

Mr. Dunigan: I do not know whether I understood your Honor correctly or not. These are the balance of the calls that this witness took. I understood counsel to say that they did not have any use for that.

Mr. Gallagher: That is incorrect. We want every single call he took.

The Court: They may look at them.

Mr. Dunigan: I understood Mr. Halle to say that they did not want to see them.

Mr. Halle: I thought this was a copy of them.

Mr. Dunigan: No, that is the balance (handing to Mr. Halle).

The Court: It is part of Exhibit 66 for identification. These are just taken out of Exhibit 66 for identification.

Mr. Dunigan: Yes.

[fol. 191] The Court: You already identified them and stated that you took these?

The Witness: Yes.

The Court: It may be conceded that the 72 were taken out of this 66 for identification. The record may show that.

Mr. Gallagher: Yes.

The Court: These 72 were taken out of 66 for identification.

Mr. Gallagher: 72 individual calls were taken out of Exhibit 66.

The Court: Yes. And they are now marked Exhibit 66. That is conceded.

Q. Read the calls and point out which voices you recognized?

Mr. Gallagher: We did advise the Court all through—I attempted to do it—that we were going to object and ask leave, first, to cross-examine and test his ability.

The Court: Do you want to examine him on the ability to identify the voice?

Mr. Gallagher: Ability to take and whether this transcript is a complete transcription.

By the Court:

Witness: I put down last all my notes, after the call was complete. No notes in shorthand. I made them in longhand. Immediately after the conversation was over I would transcribe them on these sheets.

Q. Did you put down everything?

A. No, sir, some of the stuff I missed; but everything that is here came over the wire.

Q. Everything that you heard, did you put down?

[fol. 192] A. I missed some words, but everything that is on the sheet——

Q. Did you put down everything that you heard?

A. No, sir.

Mr. Gallagher: May I respectfully submit that the witness has testified that everything that is here came over the wire. May I ask if everything that came over the wire is here?

The Witness: Except those that I did not get.

Mr. Gallagher: I respectfully object to him testifying to anything on the ground that there is no proof that the conversation is complete.

The Court: Overruled. You may answer the question.

A. Outgoing call at 1:06 P. M., January 3, 1936.

Out: Caroline. Longacre 5-7994.

In (female): Hello.

Out: Frank there?
In: Just a minute.
In (Frank): Yes.
Out: I don't think they want it.
In: Give it to Louie. The market dropped.
Out: They are going to take it next door.
In: Let him.

Outgoing, 1:15 P. M., January 3, 1936.

Out (Caroline): Longacre 5-7994.
In (female): Hello.
Out: Frank again.
In (Frank): Yes. Caroline.
Out: They didn't take it.
In: Take it to Bayard Street.
Out: O. K.

[fol. 193] Outgoing, 3:38 P. M., January 3, 1936.

Out (Frank): Is New Haven a long distance call.
Operator: No it isn't.
Out: Give me New Haven 8-3792.
In (female): Hello.
Out: Is Tom there?
In: Who is calling.
Out: Frank from New York.
In: No he isn't. Any message?
Out: Yes. I have some merchandise for him.
In: What did you say?

(Italian)

Out: I have some alcohol at a good price for him. Tell him to call me.
In: What is the number?
Out: Dry Dock 4-6284.
In: Repeats number. All right.

Incoming 10:05 A. M., January 4, 1936.

Out (Caroline): Hello.
In (Frank): Any calls for me, Caroline?
Out: Yes. Tom from Conn. called you.
In: Did you tell him?
Out: Yes. But he wants you to call him.
In: I'll do that.

Out: Can you get any liquor candy?
In: No.
Out: That's what I told them.
In: O. K. See you later.

Incoming, 3:22 P. M., January 6, 1936.

Out (Caroline): Hello.
In (male): Any calls for me Caroline?
Out: No. Are you coming here?
In: No. Call me at Longacre if you want me for anything.
Out: O. K.

[fol. 194] Outgoing call 10:30 A. M., January 7, 1936.

Out (Frank): Whitehall 4-7360.
In (female): Hello.
Out: Bert, please.
In: Just a minute.
In (Bert): Hello.
Out: What is it Bert——
In: I'm downtown, Frank. Do you know what happened.
Out: No.
In (Bert): The engine broke down and it cost $162.57 to fix and 15.20 to send it.
Out: You better come over here.
In: All right. I be right up.

By Mr. Dunigan:

What was that telephone number?
A. Whitehall 4-7360. It is the telephone number of the Atlas Diesel Engine Company.

Mr. Dunigan: I offer in evidence Government's Exhibit 49 for identification.
Mr. Halle: What is that last call?
The Witness: Call 23.

Mr. Gallagher: Objected to on the ground it is incompetent, immaterial and irrelevant.
The Court: Why?
Mr. Gallagher: May I respectfully submit that these three I's are all legal I's. They have to be used. We might explain, if the Court so desires.
The Court: I always want the information unless I sustain the objection.

Mr. Gallagher: There is nothing in the paper that shows any acts of any of the defendants now on trial. It does not mention any of their names, no proof that it was received for them.

(Paper handed to the Court.)

[fol. 195] Mr. Gallagher: I respectfully submit that that is incompetent and can not be used against any one of these defendants and should not be offered in evidence.

The Court: Come up.

(The following proceedings were had at the bench without the hearing of the jury.)

The Court: How is this connected?

Mr. Dunigan: In this way: He has just read a conversation between Frank and Bert where they call this number, the Atlas Diesel Company. The Atlas Diesel man testified that was an invoice for motor parts which he shipped to Nova Scotia. You can see that includes in these as well as in the checks, and since it was going out of the country——

The Court: How is it connected?

Mr. Dunigan: The exact amount, $162.57.

Mr. Gallagher: That has nothing to do with this case.

The Court: Outside of the amount how do you connect it?

Mr. Dunigan: The man testified that he sold this machinery and was told to call a man by the name of Durand.

The Court: Who testified as to the sale?

Mr. Dunigan: The Atlas Diesel man, Mr. Nilsson, sold machinery and shipped it to Nova Scotia. Here is something about Bert saying that the engine broke down and we have this amount.

The Court: What is your objection?

Mr. Gallagher: The only evidence that the District Attor-
[fol. 196] ney has as to that, is a man named Nilsson from the Atlas Diesel Engine Company states that at the request of somebody unknown to him he shipped the parts of the engine to Canada and was directed to see a man named Durand and send a bill to him. There is no proof from this exhibit as to where it was eventually delivered or what boat it was used on, what boat broke down and

who owned the boat. There is nothing in this exhibit to connect any of the defendants.

The Court: I will consider this motion. You will renew it.

(The proceedings were resumed within the hearing of the jury.)

The Witness: Incoming call at 10:35 A. M., January 7, 1936.

Out (Frank): Hello.

In (Bert): Frank, I'll be a half hour or so. Mr. Russell is here. Want to talk to him?

Out: Yes. Put him on.

In (Mr. Russell): Say, how are you.

Out: Financially sick.

In: We all have that. Say those 2 bottles of champagne were lousy. Flat.

Out: They come from the best winery. I don't understand that.

In: I sure was sore.

Out: You won't have to pay for them. I have one here. I'll give Bert for you.

In: Are you sure that's all right?

Out: Nothing is sure, Mr. Russel. I'll send you that bottle.

In: All right, Frank.

[fol. 197] Outgoing, 10:42 A. M., January 7, 1936.

Out (Frank Carmine): John 4-2822.

In (female): Hello.

Out: Mr. Leo Frank, please.

In: Who is calling?

Out: Frank Carmine.

In: He is not in. Can I have him call you?

Out: Yes. Drydock 4-6284.

In: (Repeats number).

Out: That's right.

Incoming, 11:12 a. m., January 7, 1936.

Out (Frank): Hello.

In (Ralph): I couldn't make that, Frank, but I met Eddie.

Out: Ralph, you don't have to call me. We can all meet Sunday over at Newark.

In: The fellow from way up above called me but my brother got the message. I'm going to call him tonight.

Out: He can't do anything; he's already has had two mishaps. Do you have any customers in Baltimore?

In: No, I haven't. I have one in Philadelphia.

Out: Who. Fox?

In: No. You won't interfere with me, Frank.

Out: That's why I asked you, Ralph. O. K. I see you later and make arrangements for Sunday.

In: O. K., Frank.

Outgoing, 11:20 A. M., January 7, 1936.

Out (Frank): Trafalgar 7-7376.

In (female): Hello.

Out (Frank): Is D there, Mrs. Lavac?

In: No, he isn't Frank. He was going to the Knickerbocker. Are you at the hotel now?

[fol. 198] Out: No. I am at Drydock 4-6284.

In: I'll have him call you.

Out: Thank you.

Outgoing, 11:35 A. M., January 7, 1936.

Out (Frank): Exchange indistinct. 7-9165.

In (male): Hello.

Out: D there?

In: Just a minute.

In (D): Hello.

Out: I just got rid of him.

In: Did you give him money?

Out: Yes. Can you come down town?

In: You come over to where we were yesterday.

Out: I'm waiting for a call.

In: I'll wait. Listen, don't go into too many things. You will be winding up behind the 8 ball.

Out: I won't. So I'll meet you at 324.

In: Yes. I'll wait.

Outgoing, 2:30 P. M., January 7, 1936.

Out (Caroline): Longacre 5-7994.

In (female): Hello.

Out: Frank there?

In: Just a minute.

In (Frank): Hello.

Out: Butch wants you to call him at 5052.
(No exchange given.)
In: All right, Caroline.
Out: The fellow on the corner wants 4 or 5 cases of John Haig. Call him up.
In: You call him and tell him I will see him tonight.
Out: O. K.

[fol. 199] Incoming, 4:25 P. M., January 7, 1936.

Out (Caroline): Hello.
In (Frank): Well.
Out: Garrison called. He is going to call me back. Where are you, at 46th Street?
In: Yes.
Out: Wait there; if you leave, call me up. I'm going to be here for 20 minutes.
In: All right.

Incoming, 12:30 P. M., January 8, 1936.

Out (Caroline): Hello.
In: Frank.
Out: Who is this?
In: Over at Newark. Any message?
Out: Just a minute.
Out (Frank): Eddie, I can't meet you.
In: No, why. It is very important that you do.
Out: O. K. I got to go upstate. I'll call you at home maybe you can come to Jersey City.
In: O. K. I'll wait for your call. Don't fail now.
Out: I won't, Ed.

Outgoing, 11:33 A. M., January 9, 1936.

Out (Frank): Wisconsin 7-9165.
In (male): Hello.
Out: Is Mr. Lavac there?
In: Just a minute. No, he isn't.
Out: Thank you.

Outgoing call, 11:30 A. M., January 9, 1936.

Out (Frank): Bryant 9-2152.
In (female Stevie): Hello.
Out: Stevie, is Mr. Lavec there?
[fol. 200] In: No, he isn't, Frank; I haven't seen him all morning.
Out: O. K., Stevie.

Outgoing, 12:33 P. M., January 10, 1936.

Out (Caroline): (Exchange indistinct) 3-1726.
In (Carmine): Hello.
Out: Nat wants you to get in touch with him; he is at the Astor now.
In: Did Louis bring you anything?
Out: Yes, some odd $300.
In: I see. I'll be home until 10 o'clock.
Out: 5052 wants you to call.
In: O. K.

Outgoing call, 2:38 P. M., January 10, 1936.

Out (Frank Carmine): Hello.
Out: Eddie there?
In: Who's calling?
Out: Frank Carmine.
In (Eddie): Hello, Frank.
Out: Hey, he said it was imitation.
In: He's crazy, it is positively O. K. I'm having some analyzed tonight.
Out: No. He is an expert. You can't tell what effect it takes is another. Anyway he is all wet on the price.
In: What price did he give you?
Out: 15 or $16 a package. What will I do with the package I have?
In: Hide it somewhere until I get in touch with you.
Out: O. K., Eddie.

Outgoing call, 10:20 A. M., January 13, 1936.

Out (Frank C.): Bryant 9-2152.
In (female Stevie): Hello.
[fol. 201] Out: How's your heart, Stevie?
In: Your boss is here, good looking. Wait, I'll see if he is nearby.
Out: Never mind. I will come right up.
In: O. K., you will be right up.

Incoming, 3:25 P. M., January 14, 1936.

Out (Caroline): Hello.
In (Frank C): Any calls?
Out: Louis just called. He said he would be home in a half hour.

(Italian.)

The Jews are here. They want 6 tins, but they won't pay more than 2.40.

In: How many have you.

Out: I only have 5. We pay 2.45 next door. Did you bring what I told you.

In: No. Tell them to wait. I'll be right down.

Out: All right.

Incoming call, 11:35 A. M., January 15, 1936.

Out (Carmine): Hello.

In (Duke): Duke, Louie's friend.

Out: Hello, Duke. What's new.

In: Got any white?

Out: No. All sold out for today. I'm getting some tomorrow. (Italian.)

In: I have some good stuff. Sugar. 6 barrels.

Out: How much?

In: I'll give you a good price, but you must take it all.

Out: Where have you got it?

In: In Brooklyn. I can deliver it any place you say.

Out: No. I can pick it up. How much.

[fol. 202] In: 10 cents under the market a quarter.

Out: 2.10 is the most I'll give.

In: I turned it down around the corner. I have 59 tins. (Polish.)

Out: What is your number? I'll call you back. I want to speak to my partner first.

In: Bensonhurst 6-9050. It's a gas station.

Out: Stay there.

In: Call me back in 10 minutes. I'm not there now.

Out: O. K., Duke.

Outgoing call, 11:41 A. M., January 15, 1936.

Out (Frank C): Bryant 9-2152.

In (female): Hello.

Out: Mr. LaVec there?

In: No, he isn't.

Out: Was he there this morning?

In: Yes, just for a few minutes.

Out: Thank you.

Outgoing call, 11:45 A. M., January 15, 1936.

Out (Frank C): Chickering 4-7100.

In (female): Picadilly, at your service.

Out: Have you a Mr. George Woodrow registered there?
In: Just a minute.
In (male): Information.
Out: Mr. George Woodrow make reservation?
In: Just a minute—no.
Out: Thank you.

Incoming call, 12:22 P. M., January 15, 1936.

Out (Frank): Hello.
In (Nat): I'm uptown, Frank, but I don't see anybody.
[fol. 203] Out: He is not registered here. I just called up.
In: I know. I did too. Is Louie around?
Out: No. I had all the goods sold last night and I couldn't get him.
In: Did he get the merchandise back?
Out: Yes, when price goes down.
In: If the price went up they would keep it.
Out: [illegible] Korn lately? What are the figures?
In: 2.15 the regular wholesale for 4 or 5 packages. Are you going to stay there?
Out: I don't want to, but I must wait.
In: The little blond is here. Stevie is not around.
Out: I know. I called up. I set the price over there.
In: [illegible] phone. We can talk about that after.
Out: Red called me at 10 o'clock last night, and said it was all off.
In: Why?
Out: He couldn't hold it. They needed money.
In: Well, what are you going to do?
Out: I'm going to stay here for a half hour and I'll either come uptown or go upstate. I thought the Frenchman wanted me with him.
In: That's what I thought. O. K., I'll call you back.
Out: O. K., Nat.

Incoming call, 12:28 P. M., January 15, 1936.

Out (Frank C.): Hello.
In (Nat): Frank, come uptown.
Out: I just hung up on Louie. He is coming here, Nat.
In: I am with them now.
[fol. 204] Out: What is the room number?

In: I wouldn't give you the room number for $50,000. I just balled Bert out for that. I'm calling Rockaway to get the figure.

Out: I'll meet you 1:30 in front of the girl-.

In: Stevie isn't here now.

Out: I know; she won't be there until 5 o'clock.

In: O. K., I'll see you.

Outgoing call, 12:35 P. M., January 15, 1936.

Out (Frank C.): Bensonhurst 6-9050.

In (Duke): Hello.

Out: Duke.

In: Yes, Carmine.

Out: You can bring 2 around. Can't do anything you are asking tops.

In: I can bring them around here like that, you have to take them all.

Out: I bought some today for 2:15 (Italian). What kind of sugar are you using; white or brown.

In: White. I'm paying 4.85, that- why I want to sell the stuff. I need sugar.

Out: I'll call you back in 20 minutes.

In: O. K.

Incoming call, 12:45 P. M., January 15, 1936.

Out (Frank C.): Hello.

In (Nat): Frank, I'm coming downtown; wait for me.

Out: How soon, Nat?

In: They are driving me down. Is Louie there?

Out: Yes; he just came in.

In: Hold him. Don't you leave.

Out: I won't.

Incoming call, 2:02 P. M., January 16, 1936.

[fol. 205] Out (Caroline): Hello.

In (Frank C.): Caroline; any calls.

Out: Yes. Bush called; he is at Morsemere 6-5516.

In: (Repeats number) Yes.

Out: Joshower wants you to get in touch with him. Bush is sore. He said, I am giving him the runaround.

In: That all?

Out: Ben Auerbach called.

In: O. K.

Outgoing call, 10:45 A. M., January 17, 1936.

Out (Frank C.): Mansfield 6-8633.
Operator: 8633.
In (female): Hello.
Out: Is Louis there?
In: No, he isn't.
Out: When he calls, have him call Frank, please.
In: O. K., Frank.

Outgoing call, 10:58 A. M., January 17, 1936.

Out (Frank Carmine): Canal 6-0863.
In: (Female)
Out: Mr. Joshower?
In: Not in just now. Any message.
Out: Yes, tell him to call Carmine.
In: I will.

Outgoing call, 3:45 P. M., January 17, 1936.

Out (Frank C.): Drydock 4-0545.
In (male): Hello.
Out: Louis Kahn there?
In: Hold the wire.
In (Louie): Hello.
Out: Weren't you supposed to bring stuff here this morning?
[fol. 206] In: Nat told me not to. That man is driving me crazy. I went to Brownsville you know. I can get you a better figure now. How many do you want?
Out: About 10.
In: Ten is all you want.
Out: Forget about. I'll get somewhere else.
In: I got it in the car. Where do you want?
Out: Where do I want it? For Christ's sake.
In: Oh, I'll be over in 5 minutes.
Out: (Hangs up.)

Incoming call, 10:45 A. M., January 18, 1936.

Out (Caroline): Hello.
In (Carmine): Caroline, any calls?
Out: No, nobody called. Did you call Costello?
In: Yes. Listen, didn't Henry call?
Out: No, he didn't.

In: If he calls before 12 o'clock ask him where I can call him. I will be at that Longacre number, 1 o'clock.
Out: All right.

Incoming call, 2:55 P. M., January 20, 1936.

Out (Caroline): Hello.
In (Frank): Any calls for me?
Out: Yes. Henry called. He wants you to call him where you were with him last week and ask for Willie. Garrison called.
In: That all?
Out: Joe Costello called.
In: Listen, if Louie calls give him the Longacre number. Anybody else, you don't know where I am.
Out: O. K.

[fol. 207] Incoming call, 10:25 A. M., January 22, 1936.

Out (Frank): Hello.
In (Nat): Are you going to keep that appointment with Pierre 11 o'clock?
Out: Yes, Nat. Where are you?
In: 14 St. Union Square. No use coming down. I will see you up the same place.
Out: Pick up the postal card on the place.
In: I will. I heard from Louie. I was talking to Maxie and he is going to meet us later.
Out: I'll call Caroline later and give her a number.
In: O. K. Frank, see you later.

Incoming call, 2:20 P. M., January 22, 1936.

Out (Caroline): Hello.
In (Frank C.): Any calls?
Out: Yes. Henry. Garrison. Louis. Joe wanted you to be at Fredericks.
In: If they call back, tell them I can't call them from where I am, and for them to call me home at 7 o'clock.
Out: Call you home.
In: Yes.

Incoming call, 12:10 P. M., January 23, 1936.

Out (Caroline): Hello.
In (Frank C.): Any calls?

Out: Dunlop called.
In: Give him the Longacre number.

(Italian.)

How many boxes have you?
Out: I think two.
In: Get rid of them for 2.30 or 2.25 and call me back. I'll be at Longacre about 12:30.
Out (in English): All right. I'll see what I can do.

[fol. 208] Outgoing call, 2:25 P. M., January 23, 1936.

Out (Caroline): Longacre 5-7994.
In (Frank): Hello.
Out: Say, he went all over. He can't get rid of it. Frank said some words I could not understand. They were inaudible.

Mr. Gallagher: May I have the last part of that read?
The Court: Yes.

(Record read by stenographer.)

Mr. Gallagher: And the date of that message?
The Witness: January 23, 1936. (Continuing reading:)

Caroline: Speak louder. I can't hear you.
In: What do you want me to write you a letter? There must be something wrong with your phone there.
Out: What did you say?
In: Never mind.

Incoming call, 4:16 P. M., January 28, 1936.

Out (Caroline): Hello.
In (Frank C.): Any calls for me.
Out: No.
In: I'm not going home tonight. I am going some place—you know.
Out: Huh huh.
In: Send word around to my father-in-law that I won't pick him up.
Out: All right.

Incoming call, 10:25 A. M., February 3, 1936.

Out (Frank C.): Hello.
In: Frank.

Out: Yes.

In: Did you get any dope?

[fol. 209] Out: No, John. When they need money they don't ask.

In: Are you going uptown?

Out: Yes, this afternoon. I have some cases this morning. I have to wait.

In: See you uptown.

Out: O K.

(Incoming call, 11:20 A. M., February 3, 1936.

Out (Caroline): Hello.

In (Joe Costello): Frank there?

Out: Who's calling?

In: Joe Costello.

Out (Frank): (3 minutes wait) Hello, Joe.

In: Have you been upstate lately?

Out: No, the weather is too bad.

In: I was up last night, but I didn't see Bill. Do you want to go up tomorrow?

Out: No. Maybe Wednesday. Who is going?

In: You and me. What are you paying for stuff.

(Italian.)

Out: Don't talk so plain on the phone. 1.90, but it must be good, full measure.

In: I understand. I'm getting 4 or 5 a day out. Would you pick it up?

Out: Can you be uptown where I saw you last week? 3 o'clock, 324 46th Street.

In: 324 46 Street. That's the place, I know.

(English.)

Out: O K., Joe.

Incoming call, 11:25 A. M., February 3, 1936.

Out (Frank): Hello.

In: Hello, Frank? (female)

Out: Yes.

[fol. 210] In: Can you send 2 gallons of alcohol to the doctor right away?

Out: Yes.

In: How much will that be?

Out: 6.50.
In: 6.50?
Out: That's right.
In: Hurry it up. He needs it.
Out: O K.

Incoming call, 11:05 A. M., February 4, 1936.

Out (Frank C.): Hello.
In (Louie Geddy): Frank Carmine?
Out: Yes.
In: Louie Geddy. Have you any of the 40 ounce fake stuff?

(Italian.)

Out: I have it in gallons only—good stuff.
In: What's the price? It's all right to talk?
Out: Yes, in Italian. $8, but it's good.
In: Can you deliver it today?
Out: How many?
In: 2 or 3 gallons. I can't leave this dump.
Out: I don't keep it in the city. I'll bring it tomorrow.
In: O K. I'll see you down here.
Out: All right, Louie.

Incoming, 11:16 A. M.

Out (Frank C.): Hello.
In (Nat): Are you going uptown?
Out: What the hell was the matter? I waited until 4:30 for you, Nat.
In: Frank and Bert didn't show up until 6 o'clock. They got 2 men. They were going to go upstate this morning but they didn't get started.
[fol. 211] Out: Did they get the license?
In: They got the license and everything. What is the number of the room?
Out: 813. I'm going to get shaved and I'll be right up.
In: All right. I meet you there.

Outgoing call, 9:52 A. M., February 18, 1936.

Out (Frank C.): Triangle 5-1993.
In (Bert): Hello.
Out: Bert?
In: Yes.

Out: Frank Carmine. Say, I was talking to Henry's wife yesterday about some barrels of malt. Do you know anything about it?

In: No, I don't. He didn't say anything. I am taking care of everything for him.

Out: I gave him $200, 3 days before he left, and I haven't seen Malt nor the change. It doesn't figure 200, but I only had 2 bills when I paid him.

In: Where are you at? I'll look into it and call you back this afternoon.

Out: Drydock 4-6284. 165 Mott Street. I won't be in this afternoon. I'll be at 324 W. 46 St.

In: I know that restaurant. I got 3 bottles there yesterday. I saw Stanley and Harry in there. I know them well. How did you get this number?

Out: Henry's wife gave it to me.

In: O K., I'll get in touch with you, Frank.

Out: O K., do that.

Incoming call, 11:20 A. M., February 18, 1936.

Out (Caroline): Hello.

In (Frank C.): Caroline.

[fol. 212] Out: Listen. Ralph from out of town called and he wants to see you very important.

In: All right, give him this number. I'll wait.

(Italian.)

Out: Frank told Antonette at the hospital Sunday for you to give his wife 5 singles.

In: That's a hot one. You got the stuff there, haven't you?

Out: Yes.

(English.)

In (aside): What do you know, Louie; Frank wants me to give Marie 5 singles. You've got stuff in Brooklyn. (To Caroline) I'll see you later.

Out: O K.

Incoming call, 11:35 A. M., February 19, 1936.

Out (Frank): Hello.

In (male): Frank?

Out: Yes.

In: I couldn't talk to you last night. I'm afraid of my wire. How are you doing?

Out: Not doing a thing. I don't seem to get started.

In: It's a shame a fellow like you not doing anything. That party you mentioned last night works with J. G. an Irish name.

Out: I don't get it.

In: He wears glasses. He works with F. T. over in Brooklyn.

Out: Oh, yes, I get it. I don't like him, he pulled a trick down the Island.

In: They certainly get them.

Out: He knows the business all right. If you talk to them they won't do nothing.

In: When will I see you?

Out: I'll get in touch with you.

In: O K., Frank.

[fol. 213] Incoming call, 10:12 A. M., February 22, 1936.

Out (Caroline): Hello.

(Italian.)

In (Frank C): Look in the little red book for that Union number.

Out: Wait a moment—Union 7-9750.

(English.)

In: (repeats number) The best I can do is ten. It hardly pays.

Out: No, it doesn't.

In: If Mimi comes hold him there.

Out: O K.

Incoming call, 10:17 A. M., February 22, 1936.

Out (Caroline): Hello.

In (Frank C.): The best I can get is ten.

(Italian.)

Out: I asked Papano. He can get it tonight, $2.

(English.)

In: I'll be over in an hour. Did Nat call?

Out: No.

In: Send Rock over there.

Out: After you come we will see.

In: I don't think I can do any better with Mimi. I'll be over in an hour.

Out: O K.

Incoming call, 10:50 A. M., February 25, 1936.

Out (Frank C.): Hello.

In (Eddie): Frank?

Out: Yes.

In: What did you find out?

Out: I have some parties interested, but I didn't see the main guy. Have to have the money right away.

[fol. 214] In: We interviewed the fellows up above and they have an indictment against three of them. They were supposed to surrender, but one of them got killed.

Out: That's a State indictment, isn't it?

In: Yes, but they were indicted for impersonating Federal Officers, and the wrap is going to be turned over to the Federal authorities. How much money is needed?

Out: Leave that to their discretion.

In: All right, I'll have them meet your party.

Out: No, I won't do that. I will introduce you but I never have them meet.

In: When will I see you?

Out: I'll have a definite answer for you tomorrow. If it goes to the Fed's, they will issue bench warrants, and they won't be execute—see. Are you going to be home tonight?

In: Yes.

Out: All right. I'll see you early, Eddie.

In: O K Frank."

Mr. Gallagher: May I have a conference with your Honor?

COLLOQUY

(Discussion at the bench, without the hearing of the jury, as follows):

Mr. Gallagher: If your Honor please, the United States Attorney had reviewed these statements before he submitted them to his witness to testify about, and it is assumed now that what was in these messages is binding. The witness is now testifying to an occurrence without question

absolutely outside the province of this Court, outside of the indictment, nothing to do with this case; showing Frank [fol. 215] Nardone apparently implicated in some manner in a shooting and killing, not in the indictment. A statement such as that is highly prejudicial.

The Court: You had an opportunity to examine them. You did not object to them.

Mr. Gallagher: We cannot object.

The Court: They were offered in evidence.

Mr. Gallagher: We objected strenuously.

The Court: Not on [illegible] there is no justification for the statement.

Mr. Gallagher: We understood the messages would have a direct bearing on the indictment.

The Court: You can look over the messages and see if any of them are objectionable. You have not objected on any such ground except right now.

Mr. Gallagher: We can not.

The Court: They were offered in evidence. You had an opportunity to look at them.

Mr. Halle: We were under the impression that we were going to be permitted to cross-examine, and we were of the impression that we were taking our objections on these grounds. To save time we did not want to jump up every minute with our objections.

The Court: You are objecting now.

Mr. Gallagher: We respectfully submit that the evidence offered by the United States Attorney on this particular last message which has now been brought to the attention [fol. 216] of the jury is so prejudicial that it necessitates a motion for a mistrial.

The Court: That is denied, that charge. You did not object to it and, secondly, you yourself saw these statements.

Mr. Gallagher: That is something radically different.

The Court: You had an opportunity to examine it. You did not object on any such ground. Do you object?

Mr. Halle: We do object. May we move to strike out all of the testimony of this witness up to the present time on the ground that the messages which he has read are not within the issues of the indictment. The indictment in counts 1 and 2 are for the importation and smuggling and violation of the law.

Count 3 is the conspiracy count. Your Honor will note that the third count in the indictment alleges a conspiracy specifically to smuggle liquor into the United States. Here are a lot of conversations about cases and packages and what not, which are entirely remote to the issues in the indictment.

The Court: How are they remote?

Mr. Halle: They are remote because in count 3 of the indictment, it charges importation. "I will have two cases."

The Court: I will let that testimony stand. Do you want to look at the rest of them?

Mr. Gallagher: May I submit to the Court that counsel understood that the messages were going to be offered as [fol. 217] an exhibit, under an order of Court. Counsel would have an opportunity after the messages were offered to cross-examine on any one of these messages offered, with the aid and assistance of the messages in front of him.

The Court: Do not misunderstand it. 66 for identification contains how many messages?

Mr. Dunigan: 504.

The Court: He selected 72 of them. If you wanted to, you had an opportunity to examine them. You did not examine them.

Mr. Gallagher: We did not so understand. We did not understand that. For the purpose of keeping the record straight, I am going to move for a mistrial.

The Court: I do not see anything to it. Assume this is a liquor business, and the statement that you now claim is objejctionable, that is, making statements about killing, that is perfectly admissible on the conspiracy. You may examine them. We will suspend for a few minutes. Let me know when you are ready.

(Short informal recess.)

(The following proceedings were had in the Judge's chambers, not in the presence of the jury.)

The Court: What is the objection to this exhibit?

Mr. Gallagher: With reference to the original findings and in addition to the examination of the balance of the messages, and we want to object to the introduction of any [fol. 218] of these messages. I do object on the ground that they have absolutely no bearing whatsoever on counts

1, 2 and 3 of the indictment. The messages appear to be conversations had with various individuals apparently relative to selling alcohol and liquors and wines long prior to March 17th, the date when it is alleged alcohol was imported into this country at pier 72, North River. The whole substance of this indictment is a conspiracy to bring liquor *from* an outside port to the Port of New York. All of the conversations testified to so far and all of the conversations on the telephone messages that we have examined, taken when the last objection was made, refer exclusively to sales of liquor and alcohol prior to the date of any entry of goods into the United States. When we are charged with an indictment we should know——

Mr. Dunigan: The third count of the indictment alleges a conspiracy beginning on or about—and the entry in the indictment is continuing—and the importation on the Southern Sword on March 17th. It alleges a conspiracy to violate the provision of the Tariff Act of 1930, and the provisions of the Anti-Smuggling Act, covering these different dates. I do not know how many dates. I do not know how many boat loads were brought into the United States. The conspiracy is not confined to the date of the importation. It alleges a conspiracy to violate the Tariff Act of February 14th.

[fol. 219] Mr. Halle: In the Terry-Wyatt case—of course I am going on my memory entirely—the Court ruled that it was improper to take the sins of a lifetime and jumble them in and make a conspiracy out of them. This is a conspiracy charge, and specifically it alleges an improper and illegal importation of alcohol into the United States.

All these conversations referred to say something about sending it and delivering it and so on. How could that be germane to the issue in this indictment? After all, it is true that in a conspiracy count the Court has the right to be most liberal and let everything go in that pertains to it, but what does not pertain to it I respectfully submit is entirely incompetent. It is immaterial, it seems to me, on the evidence. You can not prove a larceny by showing that the defendant is a crook by profession.

The Court: You can sometimes show a course of dealing.

Mr. Halle: If you show a course of dealing pertaining to the charge in the indictment, if there was a course of dealing in these conversations with reference to bringing in a

boat of liquor into the United States, it would be an entirely different proposition. But when it shows one or two cases of liquor and molasses—some of them are with regard to molasses——

Mr. Dunigan: From our experience we know what they refer to in the case of cases. These conversations, most of [fol. 220] them, are conversations between Frank and Bert and Nat, Burt Erickson and Nat Hoffman are alleged to be conspirators. We have direct calls in court from Bellman and Bert by Stevie.

Mr. Halle: In the indictment they are charged with a general conspiracy to operate and sell the liquor, non-tax paid, including all of the imported liquor and alcohol into the United States. If that was all put together in one conspiracy, which could have been easily done, it would be a different proposition. But we were completely misled as to the conspiracy.

Mr. Gallagher: As Mr. Halle has said, any implication is a matter of argument. These individual transactions as advanced by the telephone conversation have absolutely nothing to do with this case and have absolutely nothing to do with the crime of conspiracy charged in the indictment.

In answer to Mr. Dunigan's reply to that on the general ground of the conspiracy, I made an application for a bill of particulars which was granted. In that bill of particulars the issues were limited to the contact by the Southern Sword and the unloading of the cargo from the Southern Sword on March 17th at pier 72, North River. It is in the bill of particulars served upon me. I am entitled to rely upon that.

Mr. Dunigan: Your statement is correct, but only so far as the statement that there was a demand for 19 items. We [fol. 221] granted two in open court. Judge Bondy granted one additional. One demand was what boat it would be alleged was operated off Winter Quarter Lightship and had received alcohol upon it. I said it was the Southern Sword.

Next, if the contact was made, where would it be stated it occurred. Mr. Gallagher limited that issue to the contact between the Southern Sword and the Isabelle H, and I said that I would grant that. I specified the place as six miles off Winter Quarter Lightship. That is as far as the bill of particulars go.

The Court: These cases this witness was testifying about are prior to the conspiracy.

Mr. Dunigan: In this sense, that the testimony has been that these fellows were all around the Belford Restaurant. That is where they operated. They were at this Belford Restaurant. There were calls to Bryant 9, 2152. He is talking to Stevie. He is asking for Mr. LeVeque, talking to Burt; talking to Nat; talking to Red Saunders. All these people are named as co-conspirators. It shows a course of dealing and naturally is perfectly relevant to the issues in the conspiracy. It shows where they are operating, how they are dealing, what the course of dealing is.

Mr. Halle: May I answer that, your Honor? Assume that the statement of Mr. Dunigan is so. How can we carry it out and reach the conclusion that it is germane to this [fol. 222] indictment? Or assume that these men did do a lot of illegal acts together, what has that to do with this case, the conversations?

The Court: It would not be admissible unless it is part of the whole conspiracy. That is so.

Mr. Dunigan: That is right.

The Court: How is it part of that conversation, these telephone conversations?

Mr. Dunigan: We allege a conspiracy to violate the Tariff Act and the Anti-Smuggling Act. There has been testimony about boats. There has been testimony about South Carolina. I take it that it is perfectly proper to show that alcohol is brought into the country. As to that we do know that this was brought in for the purpose of making whiskey and having it cut and cleaned and all sorts of things happened to it. I do not know what they were running at 165 Mott Street, whether that was the headquarters for the alcohol which was imported.

The Court: You have not limited yourself in any manner to the Southern Sword, the conspiracy?

Mr. Dunigan: No, I have not limited myself to the Southern Sword.

The Court: In the bill of particulars.

Mr. Dunigan: I state in the indictment that certain people would finance the purchase of liquor and would facilitate its introduction into the country. We stated that the Isabelle H was at sea and smaller boats met the Isabelle H. In the bill of particulars I do not refer specifically to the one boat. [fol. 223] The Court: Were these acts subsequent to the delivery by this Isabelle H? Is the transaction prior to these conversations?

Mr. Dunigan: The testimony has been that the Isabelle H delivered to the Southern Sword on March 16th.

The Court: These conversations are when?

Mr. Dunigan: They are prior to March 16th.

Mr. Halle: He is limited in the conspiracy indictment. They specifically charge that it is a conspiracy to smuggle liquor into the United States, whether it was by any one boat or one hundred boats, pier 72 or a dock in the United States.

The Court: The conspiracy charge covers a period there before——

Mr. Halle: Yes. They have conversations which do not pertain to the smuggling charge, which do not pertain to the——

The Court: Is there anything in the conversations from which the jury can infer that liquor was smuggled into the United States?

Mr. Halle: No.

Mr. Gallagher: No.

Mr. Halle: The drawer of the indictment limits himself to the smuggling of liquor illegally, its author limited himself in this indictment. Your Honor will see that.

Mr. Gallagher: May I submit that in the telephone conversation there is not a single word with reference to any [fol. 224] alleged conspiracy or concoction of a conspiracy or maintenance of a conspiracy. Not a word of any kind or description with reference to the things charged specifically, but we may assume sales made in the United States, in the City of New York, prior to March 17th.

Mr. Dunigan: We say that these fellow- were engaged in smuggling into the United States. They are not going to say over the phone that the Southern Sword had it.

The Court: Of course not.

Mr. Dunigan: On the conversation before it the jury may infer from that testimony that has been introduced that liquor was brought in by these conversations.

Mr. Halle: That would be the issue.

The Court: Is there anything in the conversations saying anything about the source of it, in these conversations?

Mr. Halle: Nothing.

Mr. Dunigan: Nothing heretofore.

The Court: Will there be other conversations?

Mr. Dunigan: Yes, I will have another man on the stand to testify to numerous conversations.

The Court: I think for the present I will take it if you can connect it. If not, it will go out. The point I am interested in however, is the point you raised.

Mr. Gallagher: May I get the papers?

The Court: Yes, get them.

Mr. Halle: May I have a word to say when they come back? I do not want to say it now.

The Court: Yes.

[fol. 225] Mr. Gallagher: As to the conspiracy I have two cases directly in point where the defendants were on trial on a charge of conspiracy. I have that in my brief at home. The United States Attorney inadvertently neglected to say they had already been indicted on another charge.

The Court: That is not admissible.

Mr. Gallagher: The Federal Court decided it was an indictment.

The Court: There is nothing like that here.

Mr. Gallagher: Yes, there is. The witness has just stated that.

The Court: It is elementary that on a trial you can not show a defendant was indicted somewhere else. If as part of the conspiracy it was stated a while ago, "we have got to look out for these men who were in trouble." That might be admissible and competent to show they had a part in the conspiracy.

Mr. Gallagher: On that top page that the officer has——

The Court: Well, get it.

Mr. Gallagher: Just before 294.

Mr. Dunigan: That is the only one.

Mr. Gallagher: The conversation alleged to have been between Frank and Eddie in which——

The Court: Eddie is who?

Mr. Gallagher: We do not know—in which Eddie said, "We interviewed the fellows up above, and they have an indictment against three of them. They were supposed to surrender, but one of them got killed."

[fol. 226] The Court: That does not indicate it was any of the defendants.

Mr. Gallagher: (Re-read message #294.)

They introduce the extraneous matter relative to the indictment of three others, described as "up above," and that a State indictment is pending against them.

The Court: Is there anything in there, Mr. Gallagher, that indicates that that indictment is against any of these defendants?

Mr. Gallagher: No. But it does indicate that Frank, the defendant, is implicated apparently, to the extent that he is going to put up money to take care of these defendants who were indicted, one of whom got killed.

The Court: One of the defendants?

Mr. Gallagher: No, one of these men who was supposed to surrender was killed. We have Frank, he would take care of the money.

The Court: I do not think there is anything in there.

Mr. Gallagher: Financial matters. They would issue bench warrants, if it goes to the Federal government, and there would not be security. I think that creates an extremely adverse atmosphere with reference to Frank Nardone as to his connection with three defendants who were in some kind of trouble, to the extent that one was killed and he was coming to the front to produce money to bring to them and that nothing would happen to them.

[fol. 227] Mr. Nolan: There was other testimony given by Mr. Picarelli where he says, "Are you going up above tomorrow?"

The Court: What do they mean by "up above"?

Mr. Nolan: Upstate.

The Court: I remember that kind of conversation.

Mr. Halle: A case upstate.

The Court: There is no evidence on that point that can go to the jury. That might have been referring to some liquor in Canada.

Mr. Nolan: The words used are, "Are you going up above?" (reading).

The Court: That is not the point here.

Mr. Nolan: They do not know whom that points to and on what fact the jury is going to decide it.

The Court: I can not say. It does state that. How important are these conversations, about what happened, to the government?

Mr. Dunigan: This particular one?

The Court: Yes.

Mr. Dunigan: I can not attach any importance to that. I do not know what they mean when they say "up above."

The Court: I read that part about "going up above."

Mr. Gallagher: The jury may infer that this defendant

is a bad actor; regardless of whether he is guilty or innocent, he is no-good.

The Court: What is that language?

Mr. Gallagher: "We interviewed the fellows up above [fol. 228] and they have an indictment against three of them. They were supposed to surrender, but one of them got killed.

The Court: What was the date of that conversation?

Mr. Gallagher: 2-25-36.

The Court: What is the next point?

Mr. Gallagher: We are objecting to all these.

The Court: I know.

Mr. Gallagher: We base it on that point.

The Court: What is the number?

Mr. Gallagher: 294.

The Court: What is the next one?

Mr. Nolan: 343.

The Court: What is the next?

Mr. Halle: The other is 370 which specifically refers to matters outside; 370.

The Court: Any others?

Mr. Halle: 431.

Mr. Gallagher: In addition to that, you are still well informed about them. I do not believe that there is any purpose in them—466 and 475.

The Court: Let me see what they are (papers handed to Court). This is 343. What is this one? Let me have 370 (handed to the Court).

Mr. Dunigan: I consent that this one go out.

The Court: That is what?

Mr. Dunigan: 343.

The Court: How about that 294? That was the first one.

Mr. Dunigan: The question is whether or not——

[fol. 229] The Court: It should go out.

Mr. Dunigan: I consent to its going out.

Mr. Gallagher: With reference to the consent to go out, I do not think that is going to do it.

The Court: I think in all probability it is admissible, but I think it is just as well that it go out. I will instruct the jury about that when we get in. What is the next one?

Mr. Dunigan: 370. I would not consent to it going out. I think it is very important (handing to Court.)

The Court: What is the importance of this?

Mr. Dunigan: First of all, they are talking about leaving word in the hotel. There is testimony that they used the

Astor Hotel. Here it says, "What's the dope? They put it off until the last week in March." Did it come in on the 17th? There might have been a change from that time on. Here is another reference that, "I will be at Longacre." That is the Belford.

The Court: Why should this 370 go out?

Mr. Halle: Because apparently it has reference to some other case.

The Court: How does it refer to it?

Mr. Halle: "They put it off until the last week in March. I have an appointment with the lawyer 11:30. He will explain it to me." This was March 10, 1936.

The Court: How does that indicate anything about the case there?

[fol. 230] Mr. Gallagher: How does it indicate anything? I do not know. But that was connected with something.

The Court: That does not mean a criminal prosecution or anything.

Mr. Dunigan: There has been no reference to the case.

The Court: I will overrule the objection as to that particular one.

Mr. Gallagher: 370. Exception.

The Court: What is the next one?

Mr. Gallagher: 431 (handing to Court).

The Court: 431. Why should that be objectionable?

Mr. Gallagher: Why bring his name into it?

The Court: Who?

Mr. Gallagher: The name mentioned in the conversation.

Mr. Dunigan: I will consent to that going out.

The Court: That is 431. Now, 466.

Mr. Gallagher: 466 and 475, are transcripts of messages of March 30th and March 31st, respectively, and are concededly after the alleged conspiracy which had been terminated by the delivery of the goods on the 17th.

The Court: Isn't that part of the conspiracy?

Mr. Dunigan: It would be admissible against Nardone, in any event, even if the conspiracy were at an end.

The Court: Any statement of course made after the conspiracy ends would be binding only on the one who made it. I will cover that in the charge, if it gets that far. What [fol. 231] number is that? 466. Is that the only objection?

Mr. Gallagher: Just preliminarily. I do not think it has to do with this case.

The Court: That is overruled. The next one is 475.

Mr. Gallagher: Those are the two.

The Court: All right, gentlemen, I will instruct the jury to disregard entirely what was said about it. You do not want to read what I am striking out?

Mr. Gallagher: No, that would only emphasize it.

The Court: What do you want me to say to them?

Mr. Gallagher: There is not anything we can do. I feel the damage has been done.

The Court: No. I think it is perfectly admissible, but in the exercise of extreme caution it may be desirable to strike it out. If you can agree upon some language that you think will cover, I will do it; otherwise I will strike out all testimony of this witness with reference to the date.

Mr. Dunigan: 294, 25th of February.

The Court: 25th of February.

Mr. Dunigan: And 343 is out.

The Court: That has not been read to them.

Mr. Dunigan: No.

The Court: Any other questions? I will take this out with me.

Mr. Nolan: I was going to say, your Honor, to suggest a stipulation that Callahan and Brown did not file any invoice. [fol. 232] We do not need to call the officer from the Custom House and have him come up. I will make that stipulation with any other that is agreed to.

The Court: No invoice was filed.

Mr. Nolan: If the officer were called as a witness he will testify that no invoice was filed.

Mr. Gallagher: If Mr. Dunigan will concede that a coastwise vessel does not have to file an invoice.

Mr. Dunigan: I won't concede that.

The Court: I will take care of that with the law.

Mr. Gallagher: We contend that the Southern Sword was a coastwise vessel running from point to point, and did not have to file it.

Mr. Nolan: Will you stipulate that the Southern Sword was a coastwise vessel and that the customs close at 4 o'clock?

Mr. Dunigan: It was licensed.

Mr. Gallagher: That this ostensible trip on the particular day in question was from Newport News to Bridgeport, Connecticut?

Mr. Dunigan: I will stipulate that no invoice was filed for it.

Mr. Nolan: If you will stipulate that the ship was seized before it could file a manifest or make an entry in the case.

Mr. Halle: And under the statute we have got 24 hours.

Mr. Dunigan: It was seized, I think, three or four days after the cargo was landed.

Mr. Halle: I am reading from this——

[fol. 233] Mr. Dunigan: I can only stipulate that the Southern Sword was licensed as a coastwise vessel.

Mr. Halle: That is all we want.

Mr. Dunigan: And I want to stipulate that no invoice was filed for the merchandise and no manifest for the ship. Are you willing to do that?

The Court: Is that conceded?

Mr. Nolan: I do not think I can concede that. I will concede that if the officer were called he would testify that no manifest was filed.

Mr. Halle: In reading from this indictment it only refers to a conspiracy to violate those two sections, which are the smuggling statute. There is nothing else to it.

The Court: Did unlawfully, wilfully and knowingly and with intent to defraud the revenue of the United States, smuggle and clandestinely introduce into the United States without making dutiable consumption entry. I want to see what the testimony is that connects this first.

(At this point the proceedings were resumed in the court room within the hearing of the jury.)

The Court: All of the testimony that this witness gave regarding the conversations—what is the date of this 294?

Mr. Dunigan: February 25th.

The Court: February 25th, 1936, is stricken out. Gentlemen, do not consider it in any way at all, but take it out of your mind. That applies to any testimony stricken out during the trial.

[fol. 234] Mr. Dunigan: There are others on February 25th.

The Court: I do not think that was testified to.

Mr. Dunigan: Not yet.

The Court: Only that portion that he testified to.

Mr. Dunigan: I withdraw this witness. I have a man that is due in another court. It will only take about two minutes. All right, step down, Mr. Picarelli.

(Witness temporarily excused.)

WALTER F. MARTIN, recalled, having been previously duly sworn, further testified as follows:

Direct examination.

By Mr. Dunigan:

Government's Exhibit 34 for identification, on last Friday I took a sample from one of the tins in that case.

Mr. Dunigan: Mark this.

(Marked Government's Exhibit 67 for identification.)

Government's Exhibit 67 for identification is the sample I took. I delivered it to the Customs chemist at the Appraisers Stores.

[fol. 235] JOSEPH V. SAMPLE, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Dunigan:

Government's Exhibit 67 for identification I have seen before. This sample was given to me by Mr. Martin at the U. S. Customs Laboratory on Friday, December 18th, at 4:30.

I have been a chemist for twelve years for the Customs Service.

I made an analysis of that sample.

Q. What did you find it to contain?

Mr. Gallagher: I object to any testimony on his part unless it is connected with an exhibit in evidence. I assume your Honor will reserve for me the right, unless it is connected up with an exhibit offered in evidence.

The Court: I take it that the witness is the only one who has had it since it was turned over. It will be taken with that understanding.

Witness: I found this to be potable ethyl alcohol, 94 strength.

Q. What portion of the sample was that?

A. 198.8. I mean by potable alcohol, suitable for beverage purposes.

Mr. Dunigan: I offer in evidence 67 and 34 for identification.

Mr. Gallagher: Same objection saved and a motion to strike it out unless it is connected with the exhibit.

[fol. 236] JOHN PICARELLI, resumed the stand, and further testified as follows:

Direct examination (continued).

By Mr. Dunigan:

Q. Go ahead.

A. Incoming call 2:15 P. M., February 25, 1936.

Out (Caroline): Hello.

In (Frank C.): Any calls?

Out: Big Bill called. He is at Louis Herring's office.

In: How long ago?

Out: About half hour ago.

In: I am at 79—listen. (Italian) Send Rock over there and let him do what he has to do.

Out: Where?

In: Over there. And I'll call back.

(English.)

Out: O. K.

Incoming call 2:39 P. M., February 28, 1936.

The Court: Unless it is necessary, unless you are going to introduce something in evidence as a result of some particular testimony that is in evidence, I see no reason to continue reading these at this stage, unless there is something you want to bring out.

Mr. Dunigan: I do not know what state you want to read them then, if you want them read.

The Court: They are along the same general lines as the other conversations?

Mr. Dunigan: I am not prepared to say that, your Honor, [fol. 237] that any particular conversation is the same as any others. They are all different, as a matter of fact.

The Court: You can do it either in summation or submit it to the jury.

Mr. Dunigan: I would prefer to have the conversation read in the manner that they have been read, unless you rule otherwise.

The Court: How many more? How many more are there? I suppose they will have to be read at some time. Go ahead.

A. (Continued.) Incoming call 2:39 P. M., February 28th, 1936.

Out (Caroline): Hello.
In (Frank C.): Caroline, any calls?
Out: No.
In: Didn't Nat call?
Out: No, nobody.

(Italian.)

In: How much money have you?
Out: 73. Do you need money?
In: Yes. 3 or 4.
Out: I'll go downstairs and see.
In: Did Victor pay you?
Out: He said he was coming over but he didn't.

(English.)

In: Go downstairs and I'll call you back.
Out: O. K.

Incoming call, 10:30 A. M., March 4, 1936.

Out. (Frank C.): Hello.
In (Moe): Hello, Frank. I was talking to my friend [fol. 238] Alberts. He is sick in bed with the flu. He was busy on that other thing.
Out: I have a lot of faith in your friend because he does it for no money. Not that I mind spending a few bucks, but it shows he really has the connections.
In: Yes, we need him on some of your things that should be cleaned up. I like to have you meet him with me.
Out: All right. I tell my partner because I never do anything without telling him.
In: I'll call you about the same time tomorrow.
Out: I can meet you where I met you yesterday.
In: I'll call you, Frank.
Out: O. K., Moe.
In: So long.

Incoming call, 1:52 P. M., March 4, 1936.

Out (Caroline): Hello.
In (Frank C.): Any calls?
Out: Nat called.
In: What else?
Out: That's all.

Outgoing call, 11:09 A. M., March 7, 1936.

Out (Frank C.): Wickersham 2-8040.
In (Female): Hello.
Out: Mrs. Schendler?
In: Just a minute.
In (Jean): Hello.
Out: Frank. Jean, is John there?
In: No, Frank, he is over in Jersey. He called you yesterday.
Out: He must have called the Longacre number. My sister didn't get the message.
[fol. 239] In: Maybe that's it.
Out: Jean, tell John to call me in the morning.
In: Sunday?
Out: Yes, at the Bayonne number.
In: O. K., Frank.

Afternoon session 2:15 P. M.

Q. Go ahead.
A. Incoming call, 9:57 A. M., March 9, 1936:

Out (Caroline): Hello.
In (Frank C.): I expect Jack and Pendergast to call. Tell them to call me at the barber shop, 11 o'clock.

(Italian.)

Out: Did you get the gallon?
In: No, but I will. A good thing you reminded me.
Out: Are you home now?
In: No, but I want to make time.
Out: O. K.

Outgoing call, 12:20 P. M., March 9, 1936.

Out (Frank C.): Hoboken 3-7062.
In (Whitey): Hello.
Out: Whitey?
In: Yes.

Out: This is Frank Carmine; what's on your mind?

In: Are you doing anything with white?

Out: Which Whitey are you? I can't place you.

[fol. 240] In: I used to be with Patsy Apeace. You'd know me if you saw me. Can I come over?

Out: Yes, tomorrow morning between 10 and 10:30.

In: O. K., Frank. I think we can get together.

Out: See you tomorrow.

Incoming call, 10:35 A. M., March 10, 1936.

Out (Frank C.): Hello.

In (John): Left word at the hotel I was in the barber shop. Why didn't you call?

Out: I thought the barber shop had his own number. I couldn't find it in the book.

In: No, the hotel connects you. What's the dope?

Out: They put it off until the last week in March. I have an appointment with the lawyer 11:30. He will explain it to me.

In: I'll have that for you today. I'm going to see that party.

Out: O. K., John. I'll be at my Longacre number 2 o'clock.

In: See you this afternoon.

Out: O. K., John.

Outgoing 10:20 A. M., March 11, 1936.

Out (Frank C.): Rutherford 2-6316. (Wire busy, operator called back.)

In (Frank): Hello.

Out: Frank, did you find that?

In: No. I looked all over the house but I can't find that card anywhere, but I think it is 39th St. 5th Avenue.

Out: His name wasn't Walker, was it?

In: No, I think it's something else, but I'm going to ask Joe.

[fol. 241] Out: How are prices?

In: Down low.

Out: Are you using No. 10?

In: No, molasses. I wouldn't use lo.

Out: Did you break up with Morris?

In: No, we quit for a while, but we are working again.

Out: Frank, I have to hit you for some money.

In: What is your number over there?
Out: 165 Mott Street.
In: I might be there this afternoon. Are you working?
Out: No, I'm laying low. I'm having lots of trouble.
In: O. K., Frank. If I come to the City I'll look you up.
Out: O. K., Frank.

Outgoing call 11:25 A. M., March 11, 1936.

Out (Caroline): Dry D 4-8775.
In (Frank): Hello.
Out: Call Jiggs at the lawyer's office.
In: O. K.

Outgoing call, 3:24 P. M., March 11, 1936.

Out (Caroline): Sunset 6-0127.
In (Plumitt): Hello.
Out: I didn't locate Frank yet. Will you be—oh, here he is. Just came in.
(Frank): Hello.
In: Frank, I called Bill and he will let me know something in the morning.
Out: Say that fellow George you told me about this morning is out of order.
In: Yeah. Listen, did your friend leave town.
Out: Between you and me he supposed to have left, but he is still here.
[fol. 242] In: Would you consider me going up there under cover of dark and contact Nat.
Out: Suppose you call me in the morning and we will meet and talk it over.
In: O. K. I'll call you in the morning.
Out: O. K.

Incoming call, 3:30 P. M.

Out (Frank): Hello.
In (Plumitt): I forgot to tell you before, Frank, a friend of mine here has 300 cases of California wine. Can you use it?
Out: No, it's a drug on the market.
In: I can sell it for $3.
Out: That's no bargain, that's what they get for it. We can talk it over in the morning.
In: O. K., Frank.

Incoming call, 10:20 A. M., March 14, 1936.

Out (Frank): Hello.
In (Plumitt): Frank, did you want me for anything?
Out: No. Say, he is blocking the way. They can't get past. They protested to the police.
In: Yes, I know.
Out: They got talking to some of the men. They are only private detectives. They can't do those things.
In: Willie will get a reply Tuesday or Wednesday.
Out: He's a funny guy, but I don't mind giving him the money because I know it will go all the way to the top.
In: Well, you know what he did for you before.
Out: It's safe for him to take it.
In: Nothing you want me for today.
[fol. 243] Out: No; we can get together Tuesday morning; he will be out then and we can talk.
In: O. K., Frank.

Incoming call, 10:30 A. M., March 14, 1936.

Out (Frank C.): Hello.
In: Joshower. Frank.
Out: Hey, what's the idea of having me call 9 o'clock last night? Do you know that cost me 30 cents?
In: I had to leave, Frank. Say, some over here. I am waiting for a call.
Out: How long will you be there?
In: For some time. Have your calls transferred over here.
Out: O. K.

Outgoing call, 10:37 A. M., March 16, 1936.

Out (Frank C.): Essex 3-1119.
In (Bill): Hello.
Out: Felix?
In: No, Bill.
Out: Frank Carmine. Get Ralph.
In: He isn't here now, Frank, but I expect him back soon.
Out: Tell him to get in touch with me. I have a good proposition for him.
In: O. K., Frank.

Incoming 10:55 A. M., March 16, 1936.

Out Frank C.): Hello.
In (Ralph): What's on your mind?

Out: When can I see you?
In: Tonight at my house.
Out: What time?
In: 8 o'clock.
Out: O. K., Ralph.

[fol. 244] Outgoing call, 10:40 A. M., March 17, 1936.

Out (Frank C.): Wisconsin 7-1351.
In (Male): Hello.
Out: Robbie there?
In: Just a minute.
In (Robbie): Hello.
Out: Frank Carmine. Robbie, is my friend there?
In: Yes, he's here.
Out: Have him wait. I'm coming right up.
In: O. K.

Incoming call, 2:50 P. M., March 23, 1936.

Out (Caroline): Hello.
In (Frank C.): Which Bill was it that called? Big Bill?
Out: No, the short fat one.
In: Bill Plymouth. What did he say?
Out: He will call you 11 o'clock tomorrow. Say, he was around here Saturday night cock eyed drunk, talking to beat the band. You better tell him to shut up.
In: O. K. I'll call him tonight.
Out: O. K.

Call 10:00 A. M., March 30, 1936.

Frank C: Hello.
Bill: Bill, Frank. I called that party and I got a meet with him for 11 o'clock.
Frank: I want to see him too but I'm going to Federal Court to bail a fellow out. Suppose you go to the restaurant and wait for me.
Bill: Gladly do that, Frank, but you know I haven't the money.
Frank: That's all right. Don't worry about that. It isn't healthy to be seen talking in the street. You go there [fol. 245] and start ordering your lunch. I'll be there as near 11 as I can.
Bill: All right, Frank.

Call, 9:50 A. M., March 31, 1936.

Out (Caroline): Hello.

(Italian.)

In (Frank C.): Have you anything there. White.
Out (Caroline): Very little. I sold 20 pieces yesterday. I have 5 left.
In (Frank C.): How much money have you?
Out (Caroline): $220.
In (Frank C.): How much do you owe him.
Out (Caroline): For 35 pieces at 2.[illegible]0.

(English.)

In (Frank C.): After eleven I'll be at Louie's office. You know the number, 1351.

(Italian.)

Out (Caroline): Francisco wants you to call him. I forgot to tell you yesterday.
In (Frank C.): All right.

Cross-examination.

By Mr. Gallagher:

The dates that these telephone messages are alleged to have been taken I was an investigator with the department. I have been tapping wires before the date of this list of messages that I have here, in the course of my regular duties, since November, 1931. I have a number of telephone calls here with reference to the messages that I have read off; they all originally came over one wire that I have read off.

[fol. 246] I think it was Drydock 4-6284. If they have others, I do not know. I did not tap any other wire. I was located when I tapped this wire at 134 Mulberry Street.

As far as I can remember, it was a five-story loft building. I was on the top floor of this building; that is this January it was 134 Mulberry, I am quite sure.

I am not quite sure of the streets. I was near Baxter Street. My best answer is that I can not quite be certain as to what streets 134 was between. I would say 134 is about the center of that street.

I stayed there intercepting messages from January 3rd to April 6th. On the ground floor was a card board lining

company named Merritt Cardboard Corporation, I think he calls himself.

I cannot describe the occupancy of the other four floors with reference to what the business was. I do not know the occupancy of any one of the four lofts in reference to the particular business. The nature of the business from what I could see of it, large machinery working the cardboard binding. I do not know exactly what they were.

We were alone in a private loft on the top floor and there were a number of men working in the same cardboard line that I spoke of. No men working around that plant in our branch of the service; they were civilians not connected with the government service. I do not know what their business was.

That did not change in occupancy between January and April. The same people remained in there from January to April. This particular wire coming out of that Drydock [fol. 247] number, I do not know if that crossed the roof of that house. I am not a technician.

I did not tap the wire. Somebody else in my department tapped the wire.

The people in the other part of the loft were interested in some kind of machinery. Cardboard machinery. I said that some machinery was on the top floor.

Separated I had a partitioned office. I used to go to my office, there was an additional partition. I do not know how many rooms the other occupants in that loft occupied on that floor. I could not answer that. I came in the door and went to my office. I never looked around. I do not know how many rooms there are on the top floor. I occupied just one room.

I do not know if that cardboard machinery concern occupied the balance of the top floor in that loft. I do not know enough about machinery to answer if that machinery cut cardboard. They worked around, cut and pressed it and shaped it.

That machinery did not make considerable noise during the night and day while I was there. The machinery that I told you about was abandoned in this office that I had. It was in the office.

In the beginning when I went there the loft was abandoned altogether and in the latter part of the investigation they had girls up there assembling stuff for this Congoleum Company.

On the top floor there were men up there who were connected with the cardboard concern and they had machinery up there, and when you asked me about the noise of the machinery when working I said it was not working while I was there. During the time I was there there were men [fol. 248] on the top floor. They were connected, as far as I know, with the cardboard concern, as far as I know they may have been.

I was right there. The machinery appeared to me to have been abandoned, not used for a long time. I did not watch what the men were doing with the machinery. I did not hear them while the telephone message was coming in. That did not interfere with my hearing. If there was a business that was going on in the next room with the thin partition, it did not bother me hearing the conversation on the tapped wire.

We had an instrument. I can not describe it. It has a headpiece that had rheostats and condensers. It is beyond me. I am not a technician. I used head phones; a receiver on just one ear. It is on a band and goes over the head. Not on both ears. One ear was exposed. If they came over the phone, we would put a hand on the ear, if there were any strange noises. I would not say there were never any strange noises. There were.

I heard the beginning of each conversation, and the end of it. The total conversation. And at the time I had a pad in front of me at all times and pencil ready to take down a short synopsis of what the conversation was. In other words I was making notes. Those notes constitute what I considered the vital parts of the conversation at the time on that one pad, and if the conversation was in Italian, I would write the notes in English by placing a "I" before what was said. I did not take down the notes in Italian.

I made a notation in short notes of what I considered [fol. 249] the material part of that conversation immediately upon the — conversation, when they hung up the receivers, then I would rewrite my notes on the pad.

Immediately after I took my notes and they hung up I then elaborated my recollection of what was said, but not every word. These telephone messages that I have given today, they do not contain every word of my recollection of what was material to the message.

They do not contain every word of my recollection of what was material in the message and did not contain every word of the entire message from one party to the other.

What I have offered you today is my transcription of anything that came over that wire as much as I could get and put down of what they said. My duty was to transcribe the intercepted messages. I put down everything that I could.

I did say I did not get everything. I took notes that came over. I did not take the detailed conversation at the time. I could not. After that I put down what was my best recollection. Yesterday I testified that I did not in every instance get the entire conversation of both parties; that is correct.

I am not a shorthand reporter. When I took notes originally I did not put down everything that happened.

If Frank told Bill to meet him at 11 o'clock, in that case I would say I would put down "F and Bill meet at 11." That would be my notes.

Then, for instance, if it was a question of going to a hotel, my note notation would be the initials of the hotel, [fol. 250] "H. A.," standing for Hotel Astor. Possibly that would be it. At some place, for instance, I wrote "Joe can not come." I think I would write "Joe" in that case.

Afterwards when I transcribed my notes I had a detailed form of conversation between Frank and the other persons stated in detail word for word the alleged conversation. I won't say word for word. There would be a lot I would miss.

I do not know if it is in the record. I cannot tell you about any particular conversation on any particular date; so that the only testimony that I have today is what I can give by refreshing my recollection by reading these notes that I made.

I did not say I wanted to make it look right. I think the conversation is as nearly correct as I possibly could do it. So that today my recollection is based entirely on my notes that I submitted.

I continued taking messages up to April 6th. There was no one else assisting me. I worked anywheres from eight and one-half to nine hours a day. I took over 500 messages from this wire in that period of time.

Mr. Gallagher: On the question of the next witness that is going to offer conversations and transcripts of same, we are in a troublesome situation, due to the fact that you permitted us to examine the record. We can not read his writing, in most instances.

The Court: That is not my trouble.

Mr. Gallagher: Most of the record is in shorthand notes.

The Court: I suppose we will have to go ahead and do the best we can.

[fol. 251] Mr. Halle: Will you give us the privilege after he is through of making our motions on those questions?

The Court: I think you ought to make them as they go on.

Mr. Halle: We will waste a lot of time if we come up as to each question.

The Court: If there is something specific.

Mr. Gallagher: We do not know what is in it. We can not read them.

Mr. Dunigan: I have gone through most of them. I had 154 conversations that we had to go through. During the noon hour we got down to 110. I have tried to cut out everything that I possible can. I cut out a considerable number.

The Court: Testimony along the same lines?

Mr. Dunigan: Entirely different.

The Court: It will not be necessary to read all of them to the jury?

Mr. Dunigan: It will be.

The Court: Is there anything about arrest?

Mr. Dunigan: I have gone through what has been called to my attention.

The Court: You have in mind what I want here?

Mr. Dunigan: Yes.

The Court: If you can not read them—I have done all I can to let you have them.

Mr. Halle: We object on the ground they are incompetent, irrelevant and immaterial, not within the issues. Will you [fol. 252] give us an opportunity after he reads them?

The Court: Yes. That just does not mean anything to me, incompetent, irrelevant and immaterial, in this court, unless you specify the reasons. Unless you specify, otherwise it means nothing. It is not specific. There can not be any catch about this. Off the record.

(Discussion off the record.)

Mr. Halle: After he is through making his statement, repeating them, then we can state our grounds for moving to strike them out.

The Court: If it is generally something that is specific, I think you ought to do it then.

Mr. Halle: We will call it to your Honor's attention right away.

Mr. Gallagher: We now, I on behalf of the defendants, move to strike out the testimony of Mr. Picarelli, the last witness, with reference to these telephone messages on the ground that they are absolutely not material to the issues.

The Court: I am still holding it. Your rights are preserved amply. We will mark it in the same way as the other, as a matter of convenience, when we get down to this witness. Is that agreeable? Have him testify as to the conversations, as we did with those 601. Is that all right?

Mr. Nolan: Suppose there is a particular one that the witness testifies to, at that time you want us to state our objection?

[fol. 253] The Court: If there is any particular testimony that is objectionable, will you call my attention to it then.

Mr. Nolan: Do you want us to agree as to that?

The Court: I do not know. You object to them, depending on the ruling. Your general objections you may make them.

(The proceedings were resumed within the hearing of the jury, as follows):

Joseph A. Kozak, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Mr. Gallagher: May I note an objection on the further ground that from the witness' own testimony the messages there are not complete in themselves, not binding upon the defendants or any of the defendants.

The Court: The motion is denied as to that.

Direct examination.

By Mr. Dunigan:

I am an investigator of the Alcohol Tax Unit. Since January 1935. Since December, 1935, I have been con-

cerned in connection with this case. Among my duties was the supervision of certain telephone pay stations in the Astor Hotel.

Bryant 9-2152, 2156, 2157, 2158, 2159 and 2160. I started supervision on December 20th, 1935, and continued up until about January 16, 1936. I had supervision of the pay sta-[fol. 254] tion at the Belford Restaurant at 324 West 46th Street. The number was Longacre 5-7994. I was supervising that particular wire from about January 20th to March 20th.

During the period that I was on the Astor wires, I must have—this is conjecture on my part—I intercepted and overheard probably several thousand, but recorded approximately 85 conversations.

I recorded at the Belford Restaurant about 500.

I know Pierre LeVeque and recognize his voice. I heard his voice over the telephone. I know the defendant Frank Carmine Nardone and recognize his voice. I heard his voice over the telephone; and William Kleb and recognize his voice. John Red Saunders I know his voice and Burt Erickson and George Geiger, Jiggs and the defendant Robert Gottfried. I heard his voice over the phone. I recognize the voice of Miss Lillian Weiss, who testified the other day, and testified that she was known as Stevie.

I was in the Belford Restaurant on March 20th. Defendants LaVeque and Nardone were arrested at the time. Mr. Gottfried was not arrested there. I did see the defendant Gottfried on that day. I had a conversation with him.

I went up to Mr. Gottfried and asked him his name. He told me it was Gottfried. I said, "Are you 'Robbie' " and he said, "Yes." I saw at the restaurant on that day Red Saunders, the witness Velez, George Geiger, Nardone and LeVeque and then later Gottfried; in addition to that Edmond Parrot. That is the gentleman who testified here. [fol. 255] He called himself Edward Parrot. In addition to that several patrons of the restaurant, about three or four at most.

The Belford Restaurant is the basement floor of a building about midway on 46th Street between Eighth and Ninth Avenues. It is located on the south side of 42nd Street. As you enter you go into a room about 20 feet long by about 18 feet wide. You enter a second room through a latticework grill, or partition. The second room is about

18 feet square. At the rear of the restaurant is a window on the southeast side, and on the southeast side is a door leading into the kitchen. Alongside of this door is an open pay station telephone. When we entered the restaurant there was a large, round, table, as I recall it in the second or rear room against the rear wall at which were seated LeVeque, Nardone, Geiger, Velez and Saunders.

By an examination of the contents of Government's Exhibit 68 marked for identification, which I have before me I am able to state whether or not those are calls or records of calls which I intercepted from the Hotel Astor pay stations and the Belford Restaurant pay stations, they are some of them.

I would take as much of the call as I possibly could in shorthand and immediately after the completion of the call from my shorthand notes and from my memory, I would immediately, or as soon as it was possible, transcribe the notes and my recollection on these sheets. I am able to state that what I have written on the sheets came from these telephone calls. I did not know the voices at the time I took them down. I know them now. I have engaged [fol. 256] these men in conversation and heard them speak and recognized their voices as being the voices which I heard over the telephone.

Preliminary cross-examination.

By Mr. Gallagher:

The first time that I saw Frank Nardone was on March 20, 1936. I mean face to face. The first time that I ever saw Frank Nardone was on March 20, 1936, and the place was this restaurant. On that occasion he was arrested.

Q. Did you ever testify anywhere with reference to his voice?

A. Yes.

Q. Did you ever testify anywhere else?

A. Yes, sir.

Q. With reference to his voice prior to March 20, 1936?

The Court: Testify in court? We are leaving the grand jury out. I won't let him testify what he said before the grand jury. Leave that out of consideration. You are asked whether you testified, leaving the grand jury out.

The Witness: Prior to March 20? No, sir.

I have testified regarding the voice of Frank Nardone prior to March 20, 1936. I did testify as to the voice of a Frank Nardone, and at the time I had not known Frank Nardone personally. I had only heard a voice which answered to the name of Frank Nardone. I testified to a voice known to me by the name of Frank or Frank Carmine at that time.

[fol. 257] Q. Yes. As a result of that testimony did you know of your own knowledge——

Mr. Dunigan: Objection.

The Court: Do not ask an objectionable question.

Q. You have perhaps regarded such a one——

The Court: Come up here.

(The following discussion occurred at the bench between Court and counsel, not in the hearing of the jury:)

The Court: As a result of this testimony there was an indictment?

Mr. Gallagher: This arrest on March 20th was absolutely illegal, no information competent for him to be placed under arrest. Certainly the question is relevant.

The Court: What was your question?

Mr. Gallagher: As a result of this testimony this voice known as Frank or Frank Carmine Nardone, before ever having met the man in his life or hearing him physically speak, they obtained an indictment in South Carolina.

The Court: How does he know whether witnesses appeared?

Mr. Gallagher: He knows all the witnesses before them.

The Court: He cannot tell what they said. There may be witnesses he does not know who were before the Grand Jury.

The Court: As a result of this testimony there was an indictment?

Mr. Gallagher: This arrest on March 20th was absolutely [fol. 258] illegal, no information competent for him to be placed under arrest. Certainly the question is relevant.

The Court: What was your question?

Mr. Gallagher: As a result of this testimony this voice known as Frank or Frank Carmine Nardone, before ever having met the man in his life or hearing him physically speak, they obtained an indictment in South Carolina.

The Court: How does he know whether witnesses appeared?

Mr. Gallagher: He knows all the witnesses before them.

The Court: He cannot tell what they said. There may be witnesses he does not know who were before the grand jury.

Mr. Gallagher: They obtained an indictment illegally. They made an illegal arrest and then after the arrest obtained this information, took that information in their possession and went before the grand jury and got an indictment.

The Court: That would be his conclusion whether the indictment was filed as a result of that testimony. He cannot tell what was in the minds of the jury.

Mr. Gallagher: He knows there was a superseding indictment found afterwards.

The Court: He does not know what was in the minds of the jury and what was before them. I cannot allow that in.

(The proceedings were resumed in the hearing of the jury, as follows):

By Mr. Gallagher:

I started on December 20th or 21st, 1935. That was the [fol. 259] time that I started supervising the first conversation which I recorded here on December 24, 1935. I continued tapping wires up to March 20, 1936. During that period of time I overheard at least eight or nine voices, I would say, which I connect with this case. I listened to the words that were coming in that might be applicable to something that I was investigating. I never went outside of that place for any other line of investigation with reference to this case. At the time I was staying on the wire, so that up to March 20, 1936, I had never met personally any of these eight men I am talking about. About eight men, if you will permit that. I testified that I knew all of these men but I had not met any of these men up to March 20, 1936. I met them for the first time when an arrest was being made in this restaurant.

From December 16th up to March 20th I intercepted or heard messages coming over the wires at the Hotel Astor and this restaurant. At the Hotel Astor I would say between one thousand and two thousand; and at the Belford about five hundred. I was vitally interested in a much

smaller number of conversations that came in on the Astor wires and a greater number that came into the restaurant.

During these conversations these various men talked and I made notes. Then on March 20th I did not talk with all of these defendants. I talked with Nardone and with LeVeque but not with Erickson. I talked with Saunders, also Geiger. After March 20th, March 21st, I talked with them again at the Commissioner's office and heard them talk. With reference to Nardone, I did hear him talk since then. I [fol. 260] have heard him speak in the corridors of the court. I have passed the time of the day with him. I have talked with Mr. LeVeque in the corridors of the court. I do not think I have talked with the others. I talked to Geiger in an automobile one day. I have talked to him, I believe, on several other occasions. I had lengthy conversations with Mr. Geiger.

I state that I am now prepared to testify that, although I met these men on March 20th for the first time and I have had some conversations with them since, that I know the voices owned by every one that was called in the intercepted messages that I now offer in evidence, from a period covering December 16th to March 20th, regarding each of the defendants.

I took my notes in shorthand, the Gregg system. It took me much longer than thirty days to learn this system. I do not know the Pitman system. I do not know it. I know of it. I started in 1930 for about six weeks at the business college, secretarial college, and took it up on my own for several years, and then in 1934, in August, from August to December, I took private lessons from a teacher in the same secretarial school where I had originally started. I finished with this special course around December 16, 1936. I think my top speed was around 110 to 120 words a minute. I had left the course. I had not fully completed it. I joined the government service at the time.

Short informal recess.

[fol. 261] (Discussion at the bench between Court and counsel as follows):

Mr. Gallagher: We would like you to reconsider the question of bail in this case. It is getting close to the Christmas holidays and the defendants have families. They want to go home and see something of their families.

The Court: It is a great hardship.

Mr. Dunigan: I will not consent to it.

Mr. Gallagher: It is a hardship on the part of the attorneys and defendants. When we left this court room I had to go to my office. I have got a case tomorrow morning which I should take care of. We have got other business besides this case.

The Court: You can have the marshal bring them in early.

Mr. Gallagher: It is a hardship. I have got to take care of things before I come here. It is near the holidays.

The Court: I hope this case will be ended before the Christmas holidays.

Mr. Dunigan: This is the last witness.

Mr. Gallagher: Will you give them bail?

The Court: We will see about it before Christmas.

Mr. Gallagher: All right.

(Further discussion as to bail.)

The Court: Would you consider the same bail?

Mr. Dunigan: No.

The Court: We will go along with the trial.

(The proceedings were resumed within the hearing of the jury, as follows:)

(Record read by the stenographer.)

[fol. 262] By Mr. Gallagher:

Immediately after each message, or if there were two or three messages intervening, or if as quite often happened, they hung up the receiver and immediately put in another call or received another call, as soon after as I had a free moment I transcribed them. Some of those transcriptions were made later. I do not think it would be hours later; all the same day before I left work. I tap-ed the wires at two places.

With reference to the Hotel Astor, I was located at the Hotel Astor in a room on the second floor.

None of these defendants ever gave me permission to intercept any of their messages. I did not tap them myself. I was instructed to go in there and I went in there and supervised. Somebody connected with my squad tapped them. In so far as I know and in so far as he is concerned,

I do not know whether he had permission from the Hotel Astor. Of my own personal knowledge I do not know whether he had permission. We were using ear phones. Neither did I have permission from any of these defendants to listen to any of their conversations.

The Court: I do not think that is admissible. We are not concerned with the question of law. The jury is not concerned with whether they had permission or not. I have ruled here they had a right to do it. That is all there is to it.

Witness continues: I do not know how fast the average man speaks in ordinary conversation. I have heard. I cannot testify from my own knowledge how fast. I will [fol. 263] not state as a stenographer that I have heard that the average man's conversation is 180 words a minute. I never heard that. If I may say so, I do not believe they would extend to that high average. I know that public speakers speak at a rate of about 100 words a minute when making an address. On occasion when a man is talking over the telephone his conversation is much faster, but there is quite frequently a pause which permits one to catch up. When I give answers to questions here now. I imagine I may speak at a rate about 105 to 110 words a minute.

The Court: I think much slower.

Witness continues: I would say at any rate—I wrote at my top speed when I was taking these messages. I said when I left the course I was able to take 110 to 120 words a minute. I have practiced some since, considerably since. Yet on the other hand I have had some layoff. I could not tell you how fast I transcribed or how fast I took down the conversations. I took down as much of the message as I could in shorthand, and then transcribed from those notes and my recollection. And the result was my best recollection, on top of the notes, the message itself, more than the mere substance. There were times when I did not get all of the message and the notes that I am now offering consist of my best recollection of the substance of each of the messages. My best recollection of the message, of the substance, plus the getting of the phraseology as nearly as I could possibly get it. I do state they are not all complete.

[fol. 264] By Mr. Halle:

Robert Gottfried I had not met until the 20th of March in the restaurant.

Q. So the voice of one, Robbie, or one, Gottfried, would have nothing to do with it, so far as identifying the voice is concerned at the time you heard it over the telephone?

A. It was the same man, sir. I overheard one particular conversation in which he described himself as Robbie and talked to someone. He called Wisconsin 7-1351 and spoke to Mr. Milton Kroppf, identifying himself as Robbie, a man by the name of Robbie, but whether that was this defendant here I was not prepared to say at the time. I had never seen the man at that particular time.

On the 20th of March I had talked with this defendant Robert Gottfried. I went up and Mr. Gottfried and Nardone came in the restaurant and took a seat. I said—I asked him his name. As I recall, he said Gottfried. I said, "Are you Robbie?" Or I said, "You are Robbie, aren't you?" He said, "Yes." That is all in the restaurant. That is the one I recall. I do not recall whether I had my own conclusion at that particular moment or whether I had met the defendant. Later on that day I had a further conversation with him and talked at great length.

I know I was interested at the time to make an identification of the voice as quickly as I could. After comprehension, yes, I would do that. I met the man there, and he said his name was Gottfried. I asked him, "Are you Robbie?" and he said, "Yes," As to knowing at the time or verifying at the time that that was the man whose voice I heard over the telephone, I do not know that I had that purpose in mind at that particular time. That was not my intent at all, not when I asked him if he was Gottfried, [fol. 265] although I asked him his first name. I still did not have in mind at the time the identification of the voice. I cannot answer, Mr. Halle, if I did or did not recognize the voice in the restaurant. I spoke to him again that same evening.

Q. Was he under arrest then?

A. No, sir. He had not been arrested that day at all, not to the best of my knowledge.

I cannot recall what I said to him. I do know that I, together with others, questioned him regarding the papers

found at the restaurant that bore his name and presumed—I do not recall that he addressed anything in particular to me. I think I do recall he was asked his telephone number. He was asked regarding—He gave the telephone number, I think what the telephone number was. He also had a conversation over the telephone with his wife, I believe. At least, so he said. He called a number and talked over the telephone and said that he would be home, I believe, within a short time. He also said to us that his car was parked uptown. More than that, as to what he said in the evening, I cannot recall. Not having seen that person before that day, with these fragments of conversation that I have just enumerated to the Court and jury, and what I say the defendant Gottfried said both at the restaurant and later in the evening, I came to the conclusion that the voice that I heard over the telephone was the voice of this defendant. I had Gottfried's messages over the telephone I would say about eight or nine times, and the last one was either the 19th or the 20th of March.

Out of all these thousands of messages that I heard over [fol. 266] the telephone I mean to tell the Court and jury that I could identify, although I had not seen the persons whose voices I heard until after, that I could identify those voices by them speaking to me and by speaking to others, by hearing their voices.

I had never taken a course in identification of voices. I am not aware that there is such a course, no, sir. I had the experience before this in the course of my duties of identifying voices. After I hear voices a number of times I get so I can recollect their voices. I cannot say that where I have been called upon to identify voices that I have made a mistake. I do not remember in the course of my duty where I have been called upon to identify voices, that I have made a mistake. I have had the experience of talking to a person over the telephone and mistaking that person for someone else.

So on the 20th of March, that night, after identifying this man or identifying the voice of Gottfried, I have never heard him talk over the telephone since then, not that I recall. In other words, all these messages that I am going to enumerate now I already had on the 20th of March.

Q. Would you say that you could read your notes now, your stenographic notes?

A. My shorthand notes? I cannot say whether I can or cannot. In taking down, in writing down in shorthand notes, the stenographic notes that I took down I did not do any guessing about notes. I relied on my memory. I think I made that clear. I took down the notes in shorthand as fast as possible and with the shorthand notes plus the actual recollection of the words used. I recall now that I may not have been able to read some of the notes that I [fol. 267] took down and wrote down. I recall I have had difficulty with some of the notes. And then I relied on my memory to fill in. In other words I did rely on my memory even though those parts which I took down in shorthand which I could not read myself, I also had to rely on my memory.

Q. Did you fill in a word or a phrase here and there just because it would make better sense, where you could not read a word?

A. I do not recall. I may have. I put down what I recollected as said. I did not put down anything else, my imagination. That is what these people said over these wires. Your impressions are the same as long as they coincide. It is all the same thing.

By the Court:

Q. You can hear a speech delivered by somebody and then go back, but you would not be able to tell the exact words, but you would be able to tell the substance, if you understood the speech?

A. Yes, sir.

Witness continues: I am a graduate of Georgetown University, bachelor of arts; graduate of the University of Pennsylvania Law School, bachelor of laws. A lawyer four and one-half years, I practiced law. In September, 1930, admitted to the bar, member of the Federal Court, Supreme Court of the State of Pennsylvania.

By Mr. Halle:

In taking down dictation in shorthand and writing it out later, outside of school, I have taken a few letters and matters of that kind. I know that the ability to take down shorthand notes depends on constant practice. If you lay [fol. 268] off for a while taking down notes in shorthand

you forget or lose your speed. That is correct. May I say this: Immediately before coming on this kind of job, three weeks in time I did the same kind of work where I had items in shorthand so that at that time I had regained, if I had lost—I had regained most of what I had lost. I do not call myself an expert, by no means. I understand that they graduate them or have graduated them from secretarial schools at 110 or 120 words a minute, and the top speed for many schools is 125 words per minute. After you get out of business school you have to take plenty of training in actual experience to make yourself a real stenographer, but I have been doing this for the last two years on occasions. To the satisfaction of my employers, evidently, too. I do not claim to be a stenographer. I was not hired by the Government as a stenographer. I do not know whether my superiors in the government service ever checked my transcript of the notes as to their correctness, as against the notes. As against the notes and against what it was. I do not know that.

By Mr. Gallagher:

I have distinct recollection today of a particular conversation taken down by me on a specific date aside from my notes. I cannot give you the exact number, but I do have definite recollections of certain calls. A telephone call made on a certain date. I have in mind December 24th. I have to rely on these records for the most part. I have not memorized these notes. I have not attempted to, but on that basis—they come back to me as I read them.

[fol. 269] Mr. Gallagher: With the exception of any specific date that he can testify to with reference to any particular telephone conversation on that specific date, the defendant objects to the witness being permitted to testify to any other telephone conversations wherein he has to rely upon these notes to refresh his recollection.

The Court: I do not understand what you are saying, I am sure.

Mr. Gallagher: With the exception of any specific date wherein he is prepared to testify to any particular conversation, and excepting that one, we strongly object to permitting the witness to testify to any other dates, to any other conversations wherein he has to rely upon these notes to refresh his recollection.

The Court: Why?

Mr. Gallagher: On the ground that he has already testified that these notes are not complete.

The Court: Overruled. You certainly do not think that he could testify from memory, make a memorandum that said a man stated in substance so and so, which words the person used, put down the substance of the conversation, except he had stenographic minutes, whether he put down every word that person said. You would not rely on the evidence if you had to put down a record of every word that a person said; you could not decide most anything.

Mr. Halle: May I add to the objection that we object to [fol. 270] the witness reading these conversations upon the ground that it appears from the witness's testimony that they are not the exact conversations that he heard, but there were other notes taken down and other impressions other than what he could remember.

The Court: Not impressions. What you heard, isn't it?

The Witness: Yes, sir.

The Court: Where they said, "Couple," you might say "two"?

The Witness: Yes.

The Court: That is what these defendants said?

The Witness: Yes.

The Court: That is not anything you put in there?

The Witness: No.

Mr. Halle: I am relying upon what this witness said on his cross-examination.

The Court: I heard what he said.

Mr. Halle: I respectfully submit we are not objecting to the witness using these papers to refresh his recollection, but we object to his reading these messages which purport to be correct copies or transcriptions of the conversation.

The Court: The witness says he used it to refresh his recollection. As a matter of convenience they may be offered in evidence. That was your stipulation except as to the general objection; that was your stipulation, was it not? What was the stipulation?

Mr. Halle: May I put it this way?

[fol. 271] The Court: No, put it my way. That is your stipulation except as to your general objection?

Mr. Halle: Yes, in general with the reservation, your Honor, and except as to our cross-examination of the witness.

The Court: That is all.

Mr. Halle: From the cross-examination. My version may be incorrect. I am bound by your Honor's rulings. I say this, that from the cross-examination it develops that what this witness is going to read now is not what he says actually transpired over the telephone, but what he took down in shorthand, plus what he remembered, which could not be taken down, plus something that he filled in to make sense when he could not read his notes. For that reason I say he cannot read the conversations and can only use these papers to refresh his recollection.

The Court: That is all he says he used it for. Tell us what was said and when it was said and by whom.

The Witness: The first four conversations, 1, 2, 3, 4 and 7, were placing calls for Halifax, Captain Ducos to Andrew Wilbank, on December 24, 1935.

The Court: Who put in the calls?

The Witness: They were put in at the pay station by the operator.

The Court: To whom?

The Witness: It was not disclosed. However, from the conversation the operator did get them.

The Court: I will strike it out, the first four conversations.

[fol. 272] The Witness: Conversation 9, December 29, 1935, 12:55 P. M. Conversation between Pierre LeVeque and a person in Montreal. The person in Montreal said, "She's not coming back. She left Monday morning. She's listing water on south side. Now, will you tell them they ought to send some money down here.

"LeVeque: What does it amount to? $100?

"Out Male Voice: No, more.

"In LeVeque: Call me when you want it. Can't be more than $150. That is all it is. What time will you be home?

"Male Voice Out: 6 o'clock.

"In LeVeque: I'll call you at 6. Send some money down tomorrow.

"Male Voice: Make sure he gets his.

"In, LeVeque: He won't have trouble. Call you 6 o'clock. Are you going to be home at 6?

"Out, Male Voice: Yes.

"In, LeVeque: O. K."

The Court: These are marked for convenience in the same way as the other.

Mr. Dunigan: 68.

(Government's Exhibit 68 for identification marked in evidence.)

The Court: Is it necessary to read all of these? Is it necessary to read these in the record? Is it material?

Mr. Dunigan: Yes.

Mr. Nolan: May I suggest he read each one whether it refreshes his recollection or he remembers it.

The Witness: No. 10, December 24, 1935, at 1:03 P. M., outgoing call:

Out, Male Voice: Hello.

In, LeVeque: Hello, Willie. Get this. That fellow left [fol. 273] Sunday morning. The reason she didn't come she draws so much water that she couldn't get out. They loaded her too much. They had no trouble.

Out, Willie: Why didn't we hear from it? They ought to be near here.

In, LeVeque: On the other thing. That fellow Bill wants to get the business at 25. The other fellow is willing to keep a half. I didn't get hold of W. A. yet. He talked to him. That guy is not going to lie. Listen, the whole thing is up to Bill. Another thing: Bill is short of money. Didn't send enough. I only gave him forty. It comes to 55-43 at the rate of exchange, 10 or 12 cents in and out. I only paid him at the rate of 40.

Out, Willie: Leave.

In, LeVeque: Listen. I sent Murray over there. It's a great big restaurant.

Out, Willie: I'll meet you down there. Bill tell you that's the reason? Sounds ridiculous.

In, LeVeque: Along the side. The water is shallow there, low, you know. South side is a little village.

Out, Willie: Bill told you that's the reason he left.

In, LeVeque: That's right. There's a man here knows all about that.

Out, Willie: O. K.

Conversation No. 11, December 24, 1935, at 1:12 P. M.:

Out Operator: Long distance.

In Operator: Try another call to Halifax.

Then I have in parentheses: (While trying to get local calls, above call came through.)

Conversation in French. Then change on, "In Male Voice."

[fol. 274] In Male Voice, in English, Burt Erickson, and French LeVeque.

In Male Voice: Hello, Henry. How are you. Whatever disputes there are between us and the other guy, we'll take care of. Listen: You'll get whatever you need. Before you are going to leave, call Bill to make sure you have merchandise. O. K. Harry, Merry Christmas.

Out, Harry: Same to you.

In, Male Voice: Hello. Just a minute.

Pause.

Then, in, LeVeque: Hello, Harry. Conversation continued in French.

Call No. 12, December 24, 1935, 1:55 P. M. Incoming call:

In, Operator: Hello.

Out, Male Voice: Is Mr. LeVeque there?

In, Operator: Who is this?

Out, Male Voice: Bill.

In, Operator: Listen, Bill, you'll have to call Bryant 2100. The chief operator said so. They don't want any incoming calls here. Wait a minute. I'll get him this time. Just a minute. I'll get him for you. (Pause.) Are you home?

Out, Bill: I'm in New York.

In, Operator: Yes, Hello. Just a minute.

Out, Bill: O. K. (Pause.)

In, Operator: The line is busy.

Out, Bill: Where is he?

In, Operator: He's around. Where are you?

Out, Bill: I'm at his home. Take this number, Susquehanna 7,7467.

In, Operator: You are at his home now?

Out, Bill: It's a public telephone outside.

In, Operator: O. K.?

[fol. 275] Call No. 13, December 24, 1935, at 2:10 P. M. Outgoing call:

Out, Male Voice: Hello.

In, LeVeque: Bill, what's up?

Out, Bill: You told me to come up.

In, LeVeque: Oh, yeah. Going to borrow my car?

Out, Bill: Yes.
In, LeVeque: Where are you?
Out, Bill: I'm in your home; downstairs. They got your superintendent drunk down here.
In, LeVeque: Listen. Put some oil in the car.
Out, Bill: Want me to meet you?
In, LeVeque: Yes. Harry's going to leave tonight.
Out, Bill: Going to leave tonight?
In, LeVeque: Yes. You'll have to shoot up to Boston. Sunday. It's very important.
Out, Bill: O. K. I'll meet you at the Astor.

Call No. 17, December 24, 1935, 3:32 P. M., out call. Room 634, Astor:

Out, Operator: Order, please.
In, Operator: Room 634. (Pause.)
Out, Freeman: Hello.
In, Operator: Hello. Is Mr. Durant there?
Out, Freeman: Who?
In, Operator: Mr. Durant. This is the girl downstairs. (Pause.)
Out, LeVeque: Hello.
In, Operator: Bill is here.
Out, LeVeque: Tell him to wait.
In, Bill: Hello.
Out, LeVeque: Want to wait a few minutes?
In, Bill: Yes.
Out, LeVeque: All right.

[fol. 276] Call No. 19, December 27, 1935, at 12:30 P. M. Incoming call:

In, Operator: Hello.
Out, Male Voice: Stevie?
In, Operator: Yes.
Out, Male Voice: Is anybody there?
In, Operator: Jiggs is here. Listen, you'll have to call upstairs. The other girl was told and I was put on the carpet this morning. Listen, Jiggs is here and the Judge.
Out, Male Voice: Who?
In, Operator: The Judge. Friend of Mac's. Listen, are you with Mr. Whosis, Mr. Durant?
Out, Male: No.
In, Operator: If you hear from him tell him to call his

home. I'm sorry, Frank. What's the difference if you call 2100? You get the same service.

Out, Male Voice: Let me speak to Jiggs. (Pause.)

In, Jiggs: Hello.

Out, Male Voice: You speak to him?

In, Jiggs: Just last night. Going to see him today.

Nardone: Where?

In, Jiggs: He takes it for granted going to see him here.

Out, Male Voice: Did you call the other people?

In, Jiggs: That's what I wanted.

This conversation was incomplete because it was cut off. It was overheard or supervised from the operator's key.

Call 22, December 27, 1935, at 1:14 P. M. Incoming call. Montreal Willbank 3034. This conversation was in French with the exception that it was in English by LeVeque:

[fol. 277] "Same to you and Merry Christmas to your family."

Conservation continues in French.

Call 26, December 31, 1935, at 11:43 A. M. Incoming call:

Out, Male Voice: This Stevie?

In, Operator: Yes.

Out, Male Voice: How are you?

In, Operator: O. K.

Out, Male Voice: See any of my boy friends?

In, Operator: Just the party you didn't want to see, Petie. Mr. Durant came in last night after 5.

Out, Male Voice: I was there myself. Thought you had the day off:

In, Operator: I came in. We're busy.

Out, Male Voice: You were kidding me. You were going to take me out to lunch today.

In, Operator: Listen. Just a minute. (Pause.)

In, Operator: I came in. One of the girls got married.

Out, Male Voice: Listen. I'll call you when *when* I'm going out to lunch. I'm over at——

In, Operator: 46th Street?

Out, Male Voice: No. The other place. 44th Street and 8th Avenue. You'll tell that to them?

In, Operator: To Mr. Durant?

Out, Nardone: Here's one of the- now. Bill.

In, Operator: Who, Big Bill?

Out, Nardone: Yes. I'll call you at one o'clock.
In, Operator: Listen.. Call you at 44th Street?
Out, Male Voice: Yes.
In, Operator: I'll tell them.
Out, Male Voice: O. K.
In, Operator: Toodle doo.

[fol. 278] Conversation 27, January 31, 1935, at 11:55 A. M. Income call:

In, Stevie: Hello.
Out, Male Voice: Hello, Stevie. How are you feeling?
In, Operator: O. K. Listen, I'll leave a note but I'm afraid she might give it to Petie. Where will you be?
Out, LeVeque: At the Normandie Restaurant at 46th Street. I expect that fellow Jiggs and somebody else.
In, Operator: Should I send them over?
Out, LeVeque: Yes.
In, Operator: I hope I'm here when they come.
Out, LeVeque: Frank is coming over there, too.
In, Operator: I leave a note for them.
Out, Male Voice: O. K., Stevie.
In, Operator: Bye, bye.

Call 28, December 31, 1935, at 1 P. M.:

In, Stevie: Hello.
Out, Male Voice: Is Mr. LeVeque there?
In, Stevie: Who's this?
Out, Male Voice: This is Red.
In, Operator: Who?
Out, Male Voice: Red, R-e-d.
In, Operator: Don't get so tough about it. He isn't here. What's your number?
Out, Red: Hoboken 3-8679.
In, Operator: I know where he is.
Out, Red: Is the Swede there?
In, Operator: No, he is not. He is with him. I know where to get him. I'll call over there and have him call you. I'll call you. (Pause.)
In, Operator: Hello. What did you say?
Hello.

Conversation cut off.

[fol. 279] Conversation 29, December 31, 1935, at 1:03 P. M. Outgoing call:

Out, Female Voice: Information.
In, Stevie: What is the number of the Normandie Restaurant on 46th Street? (Pause.)
Out, Information: The number is Medalion 3-9786.
In, Stevie: Thank you.
Out, Information: You're welcome. (Pause.)
Out, Female Voice: Hello.
Stevie: Is Mr. LeVeque there?
Out, Female Voice: Who?
In, Operator: Mr. LeVeque.
Out, Female Voice: Just a minute. (Pause.)
Out, LeVeque: Hello.
In, Stevie: Listen. Red just called. Call him at Hoboken 3-8679.
Out, LeVeque: Frank there?
In, Stevie: No. You got Jiggs there?
Out, LeVeque: Yes. You love me?
In, Operator: Yes. Are you coming over here?
Out, LeVeque: No. You don't love me.
In, Stevie: Are you coming over here.
Out, LeVeque: No. You don't love me.
In, Operator: Listen. Don't forget to call him.
Out, LeVeque: O. K.

Call No. 30, December 31, 1935, at 1:12 P. M. Outgoing call:

Out, Male Voice: Hello.
In, Stevie: Is Red there? (Pause.)
In, Stevie: Did he call you?
Out, Red: He just called me. What's your name?
[fol. 280] In, Operator: My name is Stevie.
Out, Red: I'm the guy who was over there with Ducos. Remember that night at the theatre?
In, Operator: I know you now. We'll skip that over the 'phone.
Out, Red: Hello.
In, Operator: Hello.
In, Operator: I remember now.
Out, Red: When you see Pierre, tell him I'm no frog. I hate frogs.

Stevie: I never see that gentleman. I asked Pierre yesterday who you were and he said his bodyguard.
Out, Red: So long.
Stevie: So long, Red.

Call 31, December 31, 1935, at 4:52 P. M. Incoming call:

In, Operator: Hello.
Out, Red: Is (name not taken) there?
In, Operator: Who is this?
Red: Red.
In, Operator: They're expecting you.
Out, Red: I'll be over in 15 minutes.
In, Stevie: All right. I'll tell them.

Call No. 32, January 2, 1936, at 12:16 P. M. Outgoing call.

Out, Female Voice: Long distance.
In, Stevie: Bay Shore—the name is Steel and Clock, Homan Avenue in Bay Shore. (Pause.)
Out, Long Distance: The number is Bay Shore 1410, if you care to make a note of it. (Pause.)
Out, Male Voice: Hello.
In, Male Voice: Is Roger Tabor around?

[fol. 281] The Court: The ones that are identified.
The Witness: It will be identified as Kleb.

(Pause.)

Out, Male Voice: No, he isn't.
In, Male Voice: Will you give him a message? Tell him to call New York.
Out, Male Voice: Here he comes now. You're in luck. (Pause.)
Out, Male Voice: Hello.
In, Male Voice: Hello, Roggie.
Bill: How are you?

The name is Roggie, as I took it.

Out, Roggie: O. K.
In, Bill: Could you come to New York this afternoon?
Out, Roggie: What for?
In, Bill: You know. We'd like to take that thing down. We want you to come down and get the money for the expenses.
Out, Roggie: Why can't you get it and bring it to me?

In, Bill: I have to leave town this afternoon. Can you get out. Can you break through the ice in a couple days?

Out, Roggie: Yes.

In, Bill: Come to the Lincoln Hotel in New York, Roggie. It's between 44th and 45th Street, in New York.

Out, Roggie: What hotel?

In, Bill: The Lincoln Hotel.

Out, Roggie: Who should I ask for?

In, Bill: Don't ask. Burke (Bert) will be there. He'll be there at 5 o'clock. He'll be sure to wait for you. You talk to him and you'll get it straightened out.

[fol. 282] Out, Roggie: O. K.

Conversation 36, January 3, 1936, at 12:45 P. M. Incoming call:

In, Operator: Hello.

Out, LeVeque: Hello, Stevie.

In, Operator: You people are pains in the neck. You say you're going in the buffet.

Out, LeVeque: Is Bennie there? (Pause.)

In, Operator: Yes, he's here. Listen, tell Frank I have a message for him. (Pause.)

Out, Male Voice: Hello.

Out, LeVeque: Hello, Bennie.

In, Bennie: Listen, that girl here is all hunged up at you guys.

Out, LeVeque: That's all right. She's my friend. Say, can you wait a little while there?

In, Bennie: What do you call a little while?

Out, LeVeque: Half an hour, three-quarters of an hour.

In, Bennie: I'll be back in an hour.

Out, LeVeque: I would like to see you about that thing.

In, Bennie: I'll be here about 2 o'clock.

Out, LeVeque: Listen, Bennie, listen. That place is not so hot.

In, Bennie: Where, up there?

Out, LeVeque: Where you are. We got picked up there today already.

In, Bennie: Here?

Out, LeVeque: No, up the other place. All right. Quarter to two.

In, Bennie: Hello. She wanted to talk to Frank, I think. (Pause.)

In, Operator: Hello.

Out, LeVeque: Yes.
In, Operator: I have a message for Frank.
[fol. 283] Out, LeVeque: Would you like to talk to him?
In, Operator: Yes, I would.
Out, LeVeque: Just a second. (Pause.)
Out, Frank Nardone: Hello.
In, Operator: Frank.
Out, Frank: What?
In, Operator: Call your sister right away.
Out, Frank: When she call?
In, Operator: When you said you were going into the dining room, but you never went.
Out, Frank: O. K.

New York, December 22, 1936, 10:30 A. M.

Trial resumed.

JOSEPH A. KOZAK, resumed.

Direct examination continued.

By Mr. Dunigan:

The Court: Go right ahead.
The Witness: Conversation 39, January 4, 1936, 12:03 P. M. Outgoing call:

Out, Operator: Order, please.
In, Operator: Buffet, please.
(Pause.)
Out, Male Voice: Hello.
In, Operator: Mr. LeVeque there?
Out, Male Voice: Just a minute.
(Pause.)
Out, LeVeque: Hello.
In, Operator: Listen. Pete is around here. Thought I'd tell you. He said he is going to wait ten minutes and then [fol. 284] he is going away.
Out, LeVeque: Did you see the other fellow?
In, Operator: No. I came back at ten minutes to twelve and didn't see nobody. Coming here when you're finished?
Out, LeVeque: Yes.

The Court: Why not say LeVeque and not in and out. Can't you read later on with a lot of these things, unless

there is some voice to be identified? Can't you say that that is voice so-and-so, giving the name of the defendant or whoever the gentleman is? It appears in here, the name?

The Witness: In most cases, yes.

The Court: Where the names appear didn't you identify the voice?

The Witness: Yes, I did.

The Court: That is what I mean.

Mr. Dunigan: I do not think I can read his writing. I do not know whether anybody else can.

The Court: If you need to read it, we will read it. I do not think you want to read all these.

Mr. Dunigan: I would like to have them read.

The Court: I do not want them read. I am not going to have them all read in now. Cross-examine. It is in evidence. It is marked in evidence as an exhibit. What is it? 68 in evidence?

The Clerk: 68.

The Court: Cross-examine.

Mr. Dunigan: If your Honor is going to rule in that matter— I would like permission——

[fol. 285] The Court: I am not stopping from reading. I am not going to have them all read now. I do not think it necessary.

Mr. Dunigan: May I have the opportunity to ask him to read certain ones for the purpose of some of these exhibits?

The Court: Yes, certainly.

By Mr. Dunigan:

Q. Read Call No. 47, Mr. Kozak?

A. Call No. 47, January 4, 1936, at 4:03 p. m. Incoming:

Operator: Hello.

Long Distance Operator: Ready on your call to Yarmouth.

(Pause.)

Out, Male Voice: Hello.

Out, Long Distance: Mr. Adams?

Adams: Yes.

Erickson: Hello.

Adams: Hello.

Erickson: Hello, Bill, how are you?

Adams: O K.

Erickson: Where were you?

Adams: Held up all day by an accident, about eight hours.

Erickson: What time will you get ready?

Adams: I'll find out everything all ready. Call you Monday morning first thing so you can be there.

Erickson: I tell you what I'll do. I'll call you nine o'clock tonight. Where are you?

Adams: At the Grand Hotel.

Erickson: I'm going to send you the money tomorrow. I got 765.

[fol. 286] Adams: That's right.

Erickson: Find out all you can. Jiggs was here. Left a note for that fellow.

Adams: I'll get in touch with Harry tomorrow morning.

Erickson: Got to understand—see myself—he must have enough. I'll call you nine o'clock tonight—our time—ten o'clock your time.

Adams: All right.

Mr. Dunigan: I will offer at this time Government's Exhibit 11 for identification.

Mr. Gallagher: May I see that?

(Document handed to Mr. Gallagher.)

Mr. Gallagher: We still press our original objection on the ground that it is in violation of Title 47 of the Communications Act (handing to Court). On the further objection, that so far as we know there is nothing in that that would identify any of these defendants with anything connected with this case.

The Court: What is the testimony about this particular exhibit?

Mr. Dunigan: The testimony has been so far respecting this particular one—there has been no testimony other than the identification, except that certain other exhibits, telegrams in evidence, printed.

The Court: Come up.

(Discussion at the bench between Court and counsel):

The Court: What is the connection with this exhibit?

Mr. Dunigan: This is a telegram which has been testified went through the substation in the Hotel Astor.

[fol. 287] The Court: Yes.

Mr. Dunigan: This is Walter Adams, $167.60 and the fifty is crossed out.

The Court: He testified about this?

Mr. Dunigan: 765 and the 50 crossed out. This went from Erickson to Adams, where Adams is talking about money. He says 765.

The Court: I see.

Mr. Dunigan: He says Adams is Bill Kleb, a co-conspirator.

The Court: I will receive it.

Mr. Gallagher: Exception.

(Government's Exhibit 11 for identification received in evidence.)

By Mr. Dunigan:

Q. Will you read Call No. 50, Mr. Kozak?

A. Conversation No. 50, January 8, 1936, at 11:55 A. M.:

Stevie: Hello.

Male Voice: This is Mr. Nillson of the Atlas-Diesel Corporation.

Stevie: What is your number there?

Nillson: Whitehall 4-7360. Where is he?

Stevie: Don't be impatient.

Nillson: It's getting too close to the time. The fellow got to be in Boston to catch the steamer in Boston at 4:30.

Stevie: Hold the wire. I'll try and get him.

Nillson: You have been doing it for two hours. What have you been doing?

Stevie: He is very busy.

Nillson: All right. (Pause.)

(Stevie then makes connection and LeVeque gets on the wire.)

[fol. 288] LeVeque: Hello, Nillson.

Nillson: Mr. Durant, this is the Atlas-Diesel Engine Corporation. We got an order this morning for engine parts to go to Yarmouth, Nova Scotia. These parts are ready for delivery to the Newark airport to catch a boat sailing this afternoon.

LeVeque: When did you get the order?

Nillson: We got the order this morning at 9:30.

LeVeque: We got some parts, too.

Nillson: This is different.

LeVeque: How much is the bill?

Nillson: $60.54.
LeVeque: What's your address?
Nillson: 115 Broad Street.
LeVeque: Broadway?
Nillson: No, Board Street.
LeVeque: I'll be right there.
Nillson: Are you prepared to take them to the Newark Airport— I have to take a taxi and that will be additional expense.
LeVeque: Listen, I'll be down.
Nillson: Hello.

Mr. Dunigan: I offer Government's Exhibit No. 50.
The Court: Let them see it, please.
Mr. Dunigan: And No. 49 (handing to Mr. Gallagher).

Mr. Gallagher: With reference to No. 49, objection was made heretofore on the ground there was absolutely nothing on this showing any connection with any of the defendants with reference to this case or any participation in the alleged conspiracy as far as this case is concerned. That ob- [fol. 289] jection was sustained heretofore. This is a new exhibit being offered.
The Court: One at a time. This is what?
Mr. Gallagher: That is 49.
The Court: Come up here, please.

(Discussion at the bench between Court and counsel:)

The Court: How is 49 connected?
Mr. Dunigan: There was testimony yesterday by Martin who read a call about Nardone, a call or conversation between Nardone and Burt Erickson, where the conversation is it costs 150 something, which was this figure here.
The Court: $162.57.
Mr. Dunigan: He fixes it as so much and sent it. Mr. LeVeque talks to Nillson of the Atlas Diesel Engine Corporation with respect to Government's Exhibit 50, where the amount is the same, $60.54. He says it is for Yarmouth, Nova Scotia. LeVeque in this call is getting some parts, and then he says this was January 7, and one is January 8.
Mr. Gallagher: I do not remember any such testimony with reference to the identification at all of particular testimony by LeVeque having received word that the boat needed repairs.
The Court: What part is that?

Mr. Dunigan: With respect to this, this was a telephone call yesterday between Nardone and Burt Erickson where one or the other says it cost so much and fixes it and sends it. The amount corresponds here with the exception of this [fol. 290] number has been rubbed out. It was a sales tax and it was necessary for it to go to the foreign country. This call refers back to it.

Mr. Gallagher: That is not my recollection of the testimony.

Mr. Dunigan: We will have to get the call out.

The Court: Get that call out.

(Call handed to the Court by Mr. Dunigan.)

Mr. Dunigan: It was testified that this number was the number of the Atlas-Diesel Engine Corporation. It cost 162.

The Court: 162.57.

Mr. Dunigan: That is rubbed out.

The Court: Read that. It says 162.57 (handing to Mr. Gallagher).

(Discussion off the record.)

The Court: What about this?

Mr. Gallagher: The conversation set forth in No. 23, the telephone conversation, was admitted into evidence. It does not say Burt Erickson. It simply says Burt. There was no identification of a man named Burt. There was no connection by the officer or agent that Burt in the conversation is the man that was known as Erickson. There is no such testimony.

The Court: What about that?

Mr. Dunigan: That is true. Naturally he did not identify Burt and identify Nardone in the conversation between Nardone and Burt.

Mr. Gallagher: They try to put something——

[fol. 291] The Court: It seems to be the same amount.

Mr. Gallagher: The same amount. There is a coincidence. It happens one thousand times in commercial enterprises where items are the same. This exhibit has never been connected with anybody in this case, with anything connected with the case. It is just a bill sent out to Nova Scotia, addressed to a man named Baker. I submit we cannot admit that. It might be a coincidence.

Mr. Dunigan: This call just read now where LeVeque is getting some parts. Then Nillson says it is a different order of 60.54.

Mr. Gallagher: We are now on 49.

Mr. Duncan: The two link together.

Mr. Gallagher: This one is incompetent, irrelevant and immaterial.

The Court: What is that, 50?

Mr. Gallagher: This is another one (handing to Court).

Mr. Dunigan: The amount is $60.54 for the parts.

The Court: Is that the amount?

Mr. Dunigan: Yes.

The Court: I will receive them both.

Mr. Gallagher: Exception.

(The following occurred in the hearing of the jury:)

(Government's Exhibits 49 and 50 for identification received in evidence.)

By Mr. Dunigan:

Q. Read Call No. 70, Mr. Kozak?

A. Call No. 70, January 10, 1936, at 1:15 P. M., incoming call:

[fol. 292] In Operator: Hello.

Out Operator: Bryant 9-2152.

In Operator: Yes.

Long Distance: I have a call for Mr. Durant from Mr. Adams. Will you pay for it?

Stevie: Yes. (Pause.)

LeVeque: Hello.

Adams (Bill Kleb): How are you?

LeVeque: O K.

Adams: Listen, we didn't get away yet. Didn't get the parts until eleven this morning.

LeVeque: Didn't get the parts till eleven this morning? They left by boat.

Adams: We got the last parts this morning at eleven o'clock. They won't leave until ten tonight or eight tomorrow. I am going to leave here at eight in the morning. He wanted some stuff, a big rope and everything.

LeVeque: What?

Adams: A big rope, hauser. I don't know what for. Just went over with Jack. Going to ride a little balance.

LeVeque: If you need anything, wire me.

Adams: I'll be on my way home but I need some money for board and things.

LeVeque: How much?

Adams: 75. I owe $40 for board bill, gave somebody $10 and I need some for the trip. I made all the arrangements for Harry. Everything he wants, provisions, whatever he ought to need.

LeVeque: When will you be here?

Adams: Sunday.

LeVeque: What time?

Adams: Sunday afternoon. Want me to come right to your house?

LeVeque: Yes.

Adams: O K.

[fol. 293] Mr. Dunigan: Read call No. 323.

A. Call No. 323. Longacre 5-7994, dated February 10, 1936, at 3.58 P. M., outgoing.

Red Saunders: Hoboken 3-7062.

Operator: Your number, please?

Saunders: Longacre 5-7994.

Operator: Ten cents, please. Thank you. Pause.

Male voice: Hello.

Saunders: Let me speak to Louie, the counterman.

Male voice: I'll try and find him for you.

Saunders: Hello. Pause.

Male voice: Hello.

Saunders: Louie?

Louie: Yes.

Saunders: This is Red. Any message there for me?

Louie: No. A telegram?

Red: Yes.

Louie: You did not get it yet?

Red: No.

Louie: Oh, it came Saturday. Must be here. I told Willie Anderson about it. Guess he didn't tell you about it.

Saunders: O. K., I'll be there and pick it up.

Louie: O. K., Red.

Mr. Dunigan: I will offer Government's Exhibit 7 for identification and 35 for identification (handing to Mr. Gallagher).

Mr. Gallagher: I object on the ground it is a violation of Title 47 of the Communications Act; on the further ground there is nothing here in either of these exhibits that connects either of the defendants on trial (handing to Court).

[fol. 294] The Court: How about this?

Mr. Dunigan: May I read one further call, your Honor?

The Court: Yes.

Q. Go ahead, Mr. Kozak.

A. Call No. 267, Longacre 5-7994, dated February 5, 1936, at 11:33 A. M. Outgoing.

Saunders: Hoboken 7062.

Operator: Your number, please?

Saunders: Longacre 5-7994.

Operator: Ten cents, please. (Tinkle) Thank you. Pause.

Male voice: Cafeteria.

Saunders: Let me speak to Myers, please.

Male voice: Myers?

Saunders: Yes.

Male voice: Hold the wire. Pause.

Male voice: Hello.

Saunders: Myers?

Myers: Yes.

Saunders: Red talking.

Myers: Yes, boy.

Saunders: Listen. I expect a wire in name of Durand, D-u-r-a-n-d. If it comes collect pay for it. It will be $5 or $6.

Myers: I will take care of it.

Saunders: If it comes it will be around $3. It's a night letter.

Myers: I will take care of it.

Saunders: I will see you later today. Tell Louie, too.

Myers: O. K.

Q. Any other call on that particular subject, Mr. Kozak, that you have there?

A. I believe there is, sir. Call No. 288 on Longacre 5-7994 and a call No. 293, dated February 7, 1936, at 3:44 P. M., outgoing.

[fol. 295] Operator: Operator.

Saunders: Hoboken 3-7062.

Operator: Your number, please?

Saunders: Longacre 5-7994.
Operator: Ten cents, please. (Tinkle) Pause.
Male Voice: Hello.
Saunders: Is Willie Anderson there?
Male Voice: Who? Harris?
Saunders: No, Willie Anderson.
Male Voice: No.
Saunders: Is Morris there?
Male Voice: No.
Saunders: Give me Louie, the counterman. Pause.
Male Voice: Hello.
Saunders: Louie?
Louie: Yes.
Saunders: Any message there for me?
Louie: No.
Saunders: A telegram?
Louie: No. You mean a Western?
Saunders: Yes.
Louie: No. I was told about it, to take it and pay for it, but nothing here.
Saunders: Is Willie Anderson there?
Louie: No. He was here this morning. A couple of other boys are here if you want to speak to them.
Saunders: No. I'll be over later.
Louie: You will be over later, Red?
Red: Yes.

Mr. Dunigan: I renew my offer in that connection. I ask your Honor to look at Government's Exhibit 60 in evidence (handing to Court).
The Court: They produce No. 60, this Exhibit.
[fol. 296] Mr. Dunigan: In the testimony in regard to that, it was one of the papers dropped by Mr. LeVeque at the Belford Restaurant May 20.
The Court: This check, Exhibit 7, how is that connected? Come up here, please.

(Discussion at the bench between Court and counsel.)

Mr. Dunigan: Red Saunders is calling Hoboken and says he expects a wire from a man named Durand, one of the aliases of LeVeque. It has been definitely established as Durand by the girl Stevie, by this item and all the other calls where he answers the phone as Mr. Durand.
The Court: It seems to be connected.

Mr. Dunigan: The Isabel H was in St. Georges.

Mr. Gallagher: This shows an instance of the party named Red Saunders being in a lunch room and calling up Hoboken looking for a telegram to him, to Red Saunders. This is from Harry Ducos in Bermuda, 700 miles away. That is not a telegram received in Hoboken.

The Court: I will admit 7. What about 35?

Mr. Dunigan: And that is a call from St. Georges to Durand referring back to this call; calls concerning both of them.

The Court: Both are received in evidence; both 7 and 35 for identification received in evidence.

Mr. Gallagher: Exception.

(Government's Exhibits 7 and 35 for identification received in evidence.)

[fol. 297] (The following occurred in the hearing of the jury.)

Mr. Dunigan:

Q. Do you know when the Pronto was seized in South Carolina?

A. Yes, sir, January 20.

Q. 1936?

A. Yes, sir.

Q. Have you a call relating to Mr. Steinfeld at Montauk Point, Long Island?

A. Yes, sir.

Q. Will you read that call, please?

A. Call No. 377 on Longacre 5-7994, February 14, 1936, 2:20 P. M., outgoing.

Long Distance: Long Distance.

LeVeque: Give me Montauk Point 96.

Long Distance: Montauk Point Long Island 96? (Pause) Your number? What is your number?

LeVeque: My number is Longacre 5-7994. (Pause.)

Long Distance: Deposit 75 cents for three minutes.

LeVeque: How much?

Long Distance: 75 cents. (Tinkle) Go ahead.

LeVeque: Hello.

Male Voice: Hello.

LeVeque: Hello, Otto, how are you?

Otto: Pretty good.

LeVeque: You know who is talking?
Otto: Who?
LeVeque: Pierre. (Pause.) Pierre (Pause) LeVeque.
Otto: Oh, Pierre. How are you?
LeVeque: Pretty good, kid. How are you? What you doing?
Otto: Nothing.
LeVeque: What's your skiff doing?
Otto: Still out fishing.
LeVeque: Want to do something? It's safe. I'll come up in the morning.
[fol. 298] Otto: Come on up. Which one do you mean? The big one?
LeVeque: The big one.
Otto: I want to sell it.
LeVeque: No, no, I'll give you a proposition which is all right. It's safe. You'll be there in the afternoon?
Otto: Yes, I will be in my house.
LeVeque: O. K.

Q. What is the date of that call?
A. February 14, 1936.
Q. Do you have a conversation there relating to Mr. Cooper at Wildwood, New Jersey?
A. Yes, sir.
Q. Will you read that one, please?
A. There are several conversations with Mr. Cooper. Conversation 316, Longacre 5-7994, February 10, 1936, an incoming call at 2:05 P. M.

Nardone: Hello.
Operator: Ready with Wildwood, Mr. Barney Cooper.
Nardone: Put him on. (Pause.)
Operator: Deposit one dollar for three minutes. (Tinkles; pause).
Barney: Hello.
LeVeque: Hello, Barney, what you find out?
Barney: Can't hear you.
LeVeque: What's new?
Barney: Nothing much new.
LeVeque: No luck?
Barney: I have been around there and have one.
LeVeque: Yeh.
Barney: That night program, it's sunk. It's a good thing, too. Charlie smashed up.

LeVeque: Oh, for God's sake. I heard of that.

[fol. 299] Barney: He got the best thing in the world. It will take about three or four weeks to fix it up. They started work on it today.

LeVeque: That's too long.

Barney: There is another one but I cannot get in touch with the boss. They are tied up three or four weeks down there. The other one would be the best.

LeVeque: I heard about it this morning.

Barney: It was at the dock. He went away to Hot Springs.

LeVeque: It shouldn't take that long.

Barney: Oh, yeh. Have to get salt water out of it.

LeVeque: I don't know that.

Barney: It's froze up too. That day you were here we had a snowstorm. There's one down there but I can't get in touch with the boss. I'll just have to look around.

LeVeque: Can he bring it in?

Barney: I don't know whether he can or not.

LeVeque: Got many?

Barney: Yes, sure. Charlie was satisfied.

LeVeque: He's got another one.

Barney: Yeh, but he's got $21,000 in it. He's afraid.

LeVeque: I will call you back in a couple days. Try to induce Charlie.

Barney: Can't. He's gone away.

LeVeque: O. K. Call you back in a couple days.

Barney: All right.

Mr. Gallagher: I want to say that I checked certain testimony. I object to this testimony on the ground it is an attempt by the Government to impeach its own witness, Bar-

[fol. 300] ney Cooper. He testified that he lived in Wildwood and LeVeque wanted to get a boat from him but Cooper would not do any business with him. This is an attempt to prove that LeVeque had one and did business with him. It's an attempt to impeach their own witness.

The Court: Denied.

Mr. Gallagher: Exception.

Mr. Dunigan: Cooper's testimony, according to my recollection, was that so far as any activities or his own boats were concerned he had nothing to do with the proposition. I think the record will bear that out.

Q. Any other calls you have with Mr. Cooper?

A. Call No. 360, Longacre 5-7994, February 12, 1936, 2:58 P. M. Outgoing.

Long Distance: Long Distance.

LeVeque: Wildwood 810.

Long Distance: Thank you. Will you hold the line, please? (Pause) Your number?

LeVeque: My number is Longacre 5-7994. (Pause) Hello. I want to speak to Barney, please. (Pause.)

Long Distance: Ready. Deposit 85 cents for three minutes.

LeVeque: All right. (Tinkles.)

Out Male Voice: Hello.

LeVeque: Can I speak to Barney?

Male Voice: Barney is not here.

LeVeque: Is not there? What's Johnnie Jones' telephone number?

Male Voice: Johnnie Jones' telephone number?

LeVeque: Yes.

[fol. 301] Out Male Voice: 6451 on the Keystone. Just a minute. I'll look it up on the Bell (Pause).

LeVeque: Thank you. (Pause.)

Male Voice: Hello. It's 777 on the Bell.

LeVeque: Three sevens?

Male Voice: That's on the Bell.

LeVeque: That's the one I'm on now? I see.

Male Voice: Who is this, Pierre?

LeVeque: Yes.

Male Voice: This is Jack. Do you want to hold the wire? I'll see if I can get him.

LeVeque: Listen. I was supposed to meet him at three o'clock.

Jack: Where? In Wildwood?

LeVeque: In Wildwood. I can't make it. Will you tell him I'll be there tomorrow between one and two positively?

Jack: Yes.

LeVeque: Listen. Better call him. He's waiting for me.

Jack: I'll tell him that.

LeVeque: Better go right away.

Jack: How have you been?

LeVeque: So-so. You know how it is.

Jack: Same all over. I'll tell him you will be here positively between one and two tomorrow. O. K.

LeVeque: Thank you.

(Discussion at the bench, off the record.)

(The following discussion was had between the Court and counsel:)

The Court: Put the stipulation on the record.

Mr. Nolan: The defendants will stipulate that if a wit-
[fol. 302] ness were called from the Custom House he will testify that no invoice was filed of the merchandise on the Southern Sword on March 17th, 1936, and that no entry of the alcohol aboard the Southern Sword was made or filed with the Collector of Customs for March 17th, 1936, or any other date thereafter up to March 20th, 1936; that the defendants do not admit that any alcohol was brought to the Port of New York on the Southern Sword.

Mr. Dunigan: No entry of alcohol was filed for merchandise on board the Southern Sword on that day or any other day thereafter until March 20th.

Mr. Nolan: And the defendants do not admit it.

Mr. Gallagher: Or the master made no entry.

The Court: There has been no entry made. What do you want?

Mr. Nolan: I will stipulate that, the defendants will, provided that there is no conclusion that any alcohol was brought to the City of New York by the Southern Sword. That is the stipulation by the Government and myself.

Mr. Dunigan: That would not be covered in the stipulation.

Mr. Nolan: Have it read as part of the stipulation.

Mr. Dunigan: What do you want?

Mr. Nolan: That the Southern Sword was a duly licensed coastwise vessel under the laws of the United States.

Mr. Dunigan: Yes.

[fol. 303] Mr. Gallagher: Its ostensible course was from Newport News to Bridgeport, Connecticut.

The Court: Where it was supposed to go, that has nothing to do with this.

Mr. Gallagher: That is all right, Mr. Nolan, this stipulation.

If the Court please, may I take a moment longer? I am going to assume that the Court is receiving every one

of these messages into evidence over our objection and when nothing is read pertinent to the papers——

The Court: As I said before, if there are any specific objections you will have to claim an objection to it.

Mr. Gallagher: We filed one general objection.

The Court: I am not talking about general objections. If there is any specific conversation that is objectionable for any reason.

Mr. Gallagher: Yes. With that in mind, and if all of these telephone messages are going to be offered in evidence, and by that I mean this: That before reading them we would like an opportunity to study this man's handwriting and see whether we can read the contents of them.

The Court: You may read them.

Mr. Gallagher: An opportunity as to some of these.

The Court: You can read them. Which, the telegrams?

Mr. Gallagher: The telephone conversations.

[fol. 304] The Court: You can look them over.

Mr. Nolan: We had them for about five minutes.

The Court: You could have used them this morning or last night.

(Discussion off the record.)

(The following occurred in the hearing of the jury:)

By Mr. Dunigan:

Q. Read call 456.

A. Longacre call, No. 456, February 22, 1936, at 2:16 P. M. Outgoing to Eldorado 5-8059.

Male Voice: Hello.

Nardone: George?

Male Voice: Who's calling?

Nardone: Frank Carmine.

Male Voice: George is home sick.

Nardone: Did you receive a telegram for Mr. Durant there yesterday or today?

Male Voice: No.

Frank: You didn't, huh.

Male Voice: No.

Frank: All right. Goodbye.

Q. How about call 484?

A. Call 484, Longacre 5-7994, February 25, 1936, 1:30 P. M., outgoing call to Wisconsin 7-1351.

Female Voice: Hello.
LeVeque: Hello, Juliet. How are you?
Female Voice: I'm fine.
LeVeque: Anybody call for me there?
Female Voice: Bill was here with some other fellow.
LeVeque: Where's he now?
Female Voice: He went out.
LeVeque: He didn't say where he was going?
[fol. 305] Female Voice: No. Robbie is here. Want to talk to him?
LeVeque: Yes.
(Pause.)
LeVeque: Hello.
Female Voice: Just a minute, LeVeque.
(Pause.)
Robbie: Hello.
LeVeque: Hello, Robbie. I didn't know you was going uptown.
Robbie: I told you I had to take a run up here.
LeVeque: We took the "L," otherwise we would have taken your car.
Robbie: I had to be up here. I had an appointment with a fellow for lunch. I'll only be here about 15 minutes; then I'm going downtown.
LeVeque: O. K. then.

Q. This voice that you identified as Robbie, that is Gottfried?
A. Yes, Gottfried.
Q. Will you read call 646?
A. 646. Longacre 5-7994, March 18, 1936, at 5:00 P. M., outgoing call to Hanover 2-7949. That is a telephone of the Alco Steamship Line.

Mr. Nolan: What number is that?
The Witness: Hanover 2-7949.
Mr. Nolan: The number of the call.
The Witness: 646.

A. (Continuing):

"Male Voice: Alkalize"—as I make it out. I took it as "Alkalize."
Male Voice: Mr. Darmham.
Male Voice: Who is calling?
Gottfried: Mr. Gottfried.

[fol. 306] Male Voice: He just stepped out. Can you call in 5 or 10 minutes?

Gottfried: Tell him it is impossible for me to see him tonight. I'll see him tomorrow at 11 o'clock at his office.

Male Voice: O. K., Mr. Gottfried.

Gottfried: Thanks.

Mr. Nolan: What is the date of that?

The Witness: March 18th, 1936.

Q. Call 647.

A. Call 647, which is marked as Exhibit 54 for identification, dated March 18, 1936, at 5:02 P. M., outgoing to Bowling Green 9-7780.

Q. Do you know what number that is, Mr. Kozak?

A. Yes, sir.

Q. What number is that?

A. It is in the name of the Mathiasen Shipping Company.

Female Voice: Hello.

Gottfried: Let me talk to the Captain, please. Mr. Gottfried.

Female Voice: Mr. Gottfried? Just a second, please.

(Pause.)

Captain: Hello.

Gottfried: Hello, Cap.

Captain: Yeh.

Gottfried: I can't make it tonight—not before 12 tomorrow. I'm out in Jersey. I'll see you 12 o'clock tomorrow.

(He hangs up and Captain said):

Captain: Did you see the other fellow?

That is the end of the conversation.

Q. What date was that call?

A. That was March 18, 1936, at 5:02 P. M.

[fol. 307] Q. Call 648.

A. Call 648, March 18, 1936, at 5:03 P. M., outgoing to Wisconsin 7-1351.

Male Voice: Hello.

Male Voice: Hello.

Male Voice: Yeh.

Male Voice: Hello. Is LeVeque there?

Male Voice: Who's this?

Male Voice: Robbie.

(Pause.)

LeVeque: Hello.
Robbie: Yeh? What time will I see you tomorrow?
LeVeque: Who's this?
Robbie: Robbie.
LeVeque: 11 o'clock.
Robbie: Where?
LeVeque: Here. Where you going?
Robbie: Coming back here?
LeVeque: Why don't you come here?
Robbie: What good can I do there? It's like a madhouse there.
LeVeque: I got to wait for somebody here.
Robbie: What's new?
LeVeque: What?
Robbie: I promised to be down there 11 o'clock tomorrow morning.
LeVeque: You'll make it. I will send Frank over. Get some news.
Robbie: Send Frank over where?
LeVeque: Jersey.
Robbie: What time you going be here? Red wants to know if you want him to pick you up there.
LeVeque: Have him come over.
Robbie: He's waiting for a call.
LeVeque: I'll call you back when I'm finished.
[fol. 308] Robbie: When you're finished you're coming here?
LeVeque: Yeh.
Robbie: O. K.

Q. Call 662.
A. 662, March 19, 1936, 4:17 P. M., incoming.

Edmund: Hello.
LeVeque: Hello. Is Robbie there?
Edmund: Just a minute. Hold the wire.
(Pause.)
Then an identified person gets on. "Hello."
LeVeque: Robbie?
Male Voice: Robbie who?
LeVeque: Is that Longacre 5-7994?
Male Voice: Yes.
LeVeque: Is it the restaurant?
Male Voice: Yes.
LeVeque: Who's talking?

(Pause.)
Edmund gets on. Hello.
LeVeque: Hello. Who's talking?
Edmund: Edmund.
The rest of the conversation was in French.

Q. Call 663.
A. 663, March 19, 1936, at 4:35 P. M., incoming:

Edmund: Hello.
LeVeque: Edmund? Pierre. Est-il la.
That is my version of the French which was spoken at the time.
Edmund: Oui.
(Pause.)
Robbie: Hello.
LeVeque: Robbie, you got to wait for the morning. Got to go back at 9 o'clock. I'll meet you tomorrow morning at my home at 10 o'clock, wherever you say.
[fol. 309] Robbie: That's all right.
LeVeque: 10 o'clock my home. Hello—call and tell him you can't do that. Don't worry yourself.
Robbie: I got to stay out of my house tonight.
LeVeque: Why?
Robbie: Well—means trouble all right.
LeVeque: All right. Anyway, so long as you take care of it tomorrow it's O. K.
Robbie: All right.
Q. Any other calls on that particular day?

Mr. Halle: What was the date of that message?
The Witness: March 19th.
Mr. Halle: What time was that?
The Witness: At 4:35 P. M.

Mr. Dunigan: That is the seventh, your Honor.
The Court: All right. Are you through with this witness?

Q. Mr. Kozak, I show you Government's Exhibit 46 for identification and ask you if you recognize that?
A. Yes, sir.
Q. Who is that?
A. That is George Geiger, otherwise known as Jiggs.

The Court: What are you going to do with this?
Mr. Dunigan: Offer all of them.
The Court: Offer each one.

Mr. Dunigan: I offer in evidence Government's Exhibit 46 for identification.

The Court: All right.

(Government's Exhibit 46 for identification received in evidence.)

[fol. 310] Q. Government's Exhibit 47 (handing).

A. That is John Saunders, or Red Saunders.

Mr. Dunigan: I offer in evidence Government's Exhibit 47 for identification.

(Government's Exhibit 47 for identification received in evidence.)

Q. I show you 38 for identification.

A. That is Cecil Bayers.

Mr. Dunigan: I offer it.

(Government's Exhibit 38 for identification received in evidence.)

Q. 48 for identification?

A. That is Bill Kleb or Walter Adams or Big Bill.

Mr. Dunigan: I offer Government's Exhibit 48 for identification in evidence.

(Government's Exhibit 48 for identification received in evidence.)

Q. Government's Exhibit 37.

A. That is Adrian Van Austrian or Percy Walters.

Mr. Dunigan: I offer it in evidence.

(Government's Exhibit 37 for identification received in evidence.)

Q. Government's Exhibits 43, 44 and 45.

A. That is Burt Erickson.

Mr. Dunigan: I offer in evidence Government's Exhibits 43, 44 and 45 for identification.

(Government's Exhibits 43, 44 and 45 for identification received in evidence.)

Q. I show you Exhibit 39.

A. That is Harold Conrad.

[fol. 311] Mr. Dunigan: I offer Government's Exhibit 39 for identification in evidence.

(Government's Exhibit 39 for identification received in evidence.)

Mr. Dunigan: I offer Government's Exhibits 34—34 and 67 for identification, being the case and bottle respectively.

Mr. Gallagher: That is absolutely incompetent, has nothing to do with this case. Your Honor probably knows the history of Exhibit 34 and the other exhibit. There is no connection with Exhibit 34. It is highly incompetent. We strenuously object to the offer.

The Court: How is it incompetent? Come up here. You gentlemen can go outside.

Short recess.

COLLOQUY

(Discussion at the bench between Court and counsel.)

Mr. Gallagher: That is incompetent because the exhibit that is being offered was obtained by the Government 700 miles away from the alleged charge of smuggling in this case, off another boat, which boat was seized outside the territorial waters.

Mr. Dunigan: There is no proof that it was seized.

Mr. Gallagher: Lieutenant-Commander Zoole——

The Court: Wasn't there testimony that it was seized?

[fol. 312] Mr. Gallagher: Lieutenant-Commander Zoole testified that it was 7 1/2 miles outside the low water mark, outside South Carolina, this being part of the cargo of the Pronto and was brought in by the Coast Guard, the Coast Guard cutter, was part of the Pronto cargo. No doubt about it.

Mr. Dunigan: The proposition is that the Treaty with Great Britain covers 12 miles. It was seized within Treaty waters. LeVeque has been definitely connected and Nardone connected with the boat Pronto and the Isabelle H. Murphy, from Yarmouth, testified that he was signed on the Isabelle H and was hired by Captain Ducos who is alleged to be a co-conspirator in this case. On the Isabelle H was James Bellman. They went to St. Pierre and they took on 2,400 cases. They had picked up the Pronto and

they towed the Pronto to a point off South Carolina, at which time about 800 cases left the Pronto. They learned of the Pronto seizure over the radio, and they put in at St. George, Burmuda. He says he left the boat there.

Velez says on the night when the Isabelle H met the Southern Sword he talked to Ducos on the Isabelle H, talked to him about the number of cases that he had and he said 1,600 cases. He identified this case as being similar to the cases that were loaded on the Southern Sword.

We established that LeVeque and Erickson sent checks [fol. 313] to Yarmouth; gave a check to Shea at New London in connection with the Pronto. We had money orders going to Walter Adams, to Erickson.

The indictment says a conspiracy in the Southern District of New York and other places to violate the Tariff Act of 1930 and the Anti-Smuggling Act of 1934. All of the evidence is admissible on the two substantive counts, that is, to do with the smuggling into the Southern District, and the concealment of the same, that would be Exhibit 34, it is admissible on the conspiracy, which is the third count.

Mr. Gallagher: The first answer to that is that I made an application in open court for a bill of particulars and Mr. Dunigan said that he was going to limit his proof to the contact between the Southern Sword and the Isabelle H and entered——

The Court: Open court when?

Mr. Gallagher: On the argument of the bill of particulars.

The Court: That was not before me.

Mr. Gallagher: No. He was going to limit it to the entry into New York at Pier 72 of 1,600 cases off the Southern Sword.

The Court: They had a right to say where it was originally.

Mr. Gallagher: They said in the bill of particulars that it was on the Southern Sword, which contacted with the Isabelle H and docked at Pier 72, North River, on March 16th, and it had 1,600 cases.

The first count of the indictment is a charge that we [fol. 314] smuggled in 9,600 gallons of alcohol, not 9,601 or 9,606, but 9,600, which is 1,600 cases.

The second count is that we possessed that. This exhibit that they are now offering is no part of that cargo, is no

part of this case and belongs to another case completely, the question of the seizure of the Pronto.

The Court: They have a right to show this thing took place at sea, the conspiracy, that it was seized then and what happened with the transaction, where it originally came into the district. Why isn't it admissible on that theory?

Mr. Gallagher: For the simple reason that it is no part of this case and that was my sole reason why I asked for a bill of particulars before we went to trial on the indictment was this: So they would limit it and I would know what to meet.

The Court: You would know what to meet. Your clients will tell you about it.

Mr. Dunigan: Mr. Gallagher made an application for a bill of particulars and what he got——

The Court: You told me all about that yesterday. It is on the record.

Mr. Dunigan: The admission which he got, referring to this portion of the indictment, said: "The said vessel which the indictment alleges was operated by the defendants, Callahan and Brown, for the purpose of receiving alcohol on the high seas from the Isabelle H was the Southern [fol. 315] Sword." His demand was as follows: "What vessel it will be alleged was operated by defendants, Callahan and Brown, for the purpose of receiving alcohol on the high seas from the Isabelle H." I said in open court, "Southern Sword."

In the next demand he says, "If said contact was made, and a trans-shipment made, at what particular point, and on what date?" And I said, "Mr. Gallagher, if you will limit your demand to the admission previously granted, the contact between the Southern Sword and the Isabelle H, I will tell you where it was made and what date."

He said he did so limit it, and we were not talking about the Pronto at all.

Mr. Halle: Here is the difficulty about receiving this in evidence in this case: The case of alcohol that is offered in evidence was seized in another case, in another conspiracy.

The Court: What has that got to do with it? This was seized here in the district, and then they had to go out to sea and get it, if it was on several vessels, why can't they show that as a part of the whole general scheme?

You might have another conspiracy at any particular place, the same as this conspiracy. I overrule the objection.

Mr. Nolan: I object on the ground there is no evidence where the Isabelle H was after she put into Bermuda. The captain has testified that if he got rid of that load he would [fol. 316] be through with it. There is no evidence that the Isabelle H put into an American port or where it was. There is no evidence connecting this particular case with the cargo that was supposed to be on the Isabelle H.

The Court: Overruled.

Mr. Nolan: Exception.

Mr. Gallagher: May I show you the bill of particulars that the Government gave me (handing to Court)?

The Court: I have read it, but I will read it again.

Mr. Nolan: On the further ground that it does not come within the pleading.

The Court: I do not see any objection to it. The smuggling took place here and they have a right to show that the conspiracy—everything that they have shown, whether in Africa or Asia or China.

Mr. Gallagher: You are overruling our objection and receiving them in evidence?

The Court: Yes.

Mr. Gallagher: Exception.

(The following took place in the courtroom in the absence of the jury:)

The Court: LeVeque, listen to me. You pleaded guilty here?

Mr. LeVeque: Yes.

The Court: That is right?

Mr. LeVeque: Yes, sir.

The Court: If you want any consideration from me, I do not say you are going to get it, you had better tell the [fol. 317] truth because when you are in jail for a long time nobody is going to help you. Do you want to tell the truth to me?

Mr. LeVeque: About what, your Honor?

The Court: About this whole thing.

Mr. Halle: May I say a word?

The Court: No. I am dealing with a defendant who has pleaded guilty.

Defendant LeVeque: About this case or——

The Court: About this case.

Defendant LeVeque: It was told on the stand here, told against me.

The Court: Who else was in it? Tell me the truth. Who was in this? Do not look at your lawyer. Look at me and answer my question. Who was in this? Who was in this conspiracy with you?

Defendant LeVeque: I cannot explain in English.

The Court: Yes, you can. How many people were with you in this, other people?

Defendant LeVeque: I cannot conspire by myself.

The Court: Who else was in this?

Defendant LeVeque: I cannot say, your Honor.

The Court: Why do you say you cannot say it? Why can't you say?

Defendant LeVeque: I do not know, Judge, about American courts.

The Court: How long have you been in this country?

Defendant LeVeque: First experience in court.

[fol. 318] The Court: How long have you been in this country?

Defendant LeVeque: 20 years.

The Court: Are you a citizen?

Defendant LeVeque: My second paper did not come yet.

The Court: You speak very good English. You listen to what I am saying. (To Mr. Halle): You take a seat over there. (To Defendant LeVeque): Listen to what I am saying to you. Do not fool me. Do not think you are fooling me. You tell the truth.

Defendant LeVeque: I am not fooling you.

The Court: Who was in on this with you? Give me the names.

Defendant LeVeque: I must give you all names?

The Court: Yes. You give me the names. Who was in this with you? Come on.

Defendant LeVeque: Your Honor, I really do not know what to say.

The Court: You tell me the truth and be quick about it. I asked you who was in this with you; give me the names.

Defendant LeVeque: Give me time for consideration.

The Court: No. Give me the names right now. Tell me who was in this.

Defendant LeVeque: I am not indicted alone.

The Court: I asked you who was in with you on this conspiracy. Now, tell me.

[fol. 319] Defendant LeVeque: That is pretty hard for me.

The Court: I do not care whether it is hard or not. Tell me.

Defendant LeVeque: I cannot say it, your Honor.

The Court: Why can't you say it?

Defendant LeVeque: My pride of a man, to say something against somebody.

The Court: You want to be a hero?

Defendant LeVeque: No.

The Court: You are going to be a hero when I sentence you. I am going to give you an opportunity now to tell me the truth. If you are going to take that attitude, you are going to be a hero. You are going to be a real one.

Defendant LeVeque: I do not want to be a hero.

The Court: You are going to be a hero.

Defendant LeVeque: I am not a young man.

The Court: You will be a hero and meet a lot of criminals. What are you going to get out of that? Nothing, because you will be serving many years in jail. Nobody can help you but yourself. Nobody can protect you but yourself. Now, do you want to tell me?

Defendant LeVeque: Can I say something, your Honor?

The Court: Yes.

Defendant LeVeque: When I was arrested I told my lawyer that I was guilty of conspiracy and I wanted to take [fol. 320] my medicine. I says, "I want you to talk to the official in charge of my case, that will prosecute me, and tell them exactly what I am telling you. I do not want to talk; no questions asked; I am willing to take my medicine." And it was told to my lawyer.

The Court: What?

Defendant LeVeque: My lawyer made this plea. I do not know who they were.

The Court: What?

Defendant LeVeque: My lawyer made this plea. I do not know who that was, some of them, I know.

The Court: Your lawyer made the plea?

Defendant LeVeque: Made the plea and told me, "I agree to that." That is as far as I know.

The Court: You won't tell, is that it?

Mr. Halle: May I say a word?

The Court: Not a word. Do not interrupt me. You won't tell me?

Defendant LeVeque: Well, your Honor, see, I have a wife and daughter at the time 20 years old.

The Court: You want to see your wife and be at home?

Defendant LeVeque: Certainly.

The Court: It will be a long time. You better tell me the truth.

Defendant LeVeque: Can you give me time for that?

The Court: You have had enough time. You tell me now. I want to know the names of the men who were in this conspiracy with you.

[fol. 321] Defendant LeVeque: I cannot say, your Honor. I do not want to be a hero or anything like that. I did not think that was going to be put to me so abruptly.

The Court: How long have you known these four men on trial, all these four men?

Defendant LeVeque: I know Mr. Nardone for about a year and a half.

The Court: Yes.

Defendant LeVeque: And Mr. Robbie, he used to own a restaurant on 47th Street.

The Court: Who is that?

Defendant LeVeque: Mr. Gottfried used to run a restaurant, the Paramount Shop House, and I used to quite often have dinner there. Mr. Callahan——

The Court: Yes.

Defendant LeVeque (continuing): I met him casually about nine months ago, once was introduced to me at the Hotel Astor. I never saw him since. The first time I saw him was when he was arrested. Captain Brown I never saw in my life.

The Court: Who did you make the arrangement with about bringing in the liquor?

Defendant LeVeque: In New York?

The Court: I do not care where.

Defendant LeVeque: I never made arrangements in New York.

The Court: I do not care where it was made. Who did you make the arrangement with?

[fol. 322] Defendant LeVeque: I did not make any arrangement.

The Court: Who made the arrangement?

Defendant LeVeque: My arrangement was made with nobody but just to take care of the boat.

The Court: Who was that made with?

Defendant LeVeque: The name of the boat?

The Court: No. Who did you make it with?

Defendant LeVeque: Harry Ducos on the high sea, I made it with Harry Ducos.

The Court: Do not fool me. I know all about these cases of liquor. How much liquor was brought into the country? How much liquor was it?

Defendant LeVeque: On this thing here?

The Court: Yes.

Defendant LeVeque: 1,600 gallons.

The Court: What happened to it?

Defendant LeVeque: I do not know.

The Court: Who took it off?

Defendant LeVeque: I did not take it off.

The Court: I said who took it off.

Defendant LeVeque: I do not know who took it off. It was off my hand.

The Court: Who took it off your hands?

Defendant LeVeque: I did not handle it at all.

[fol. 323] The Court: Who handled it? Are you afraid of anyone? Are you afraid of anybody?

Defendant LeVeque: No.

The Court: Do not be afraid of criminals. Do not be afraid of criminals.

Defendant LeVeque: I am not afraid.

The Court: The Government will protect you against them. Are you afraid of these people here now?

Defendant LeVeque: No, sir.

The Court: Now, tell me the truth. Tell me the truth. I want to know from you who was in on this with you. You were not in it alone, were you?

Defendant LeVeque: No, sir.

The Court: There were other people?

Defendant LeVeque: Yes, sir.

The Court: How many?

Defendant LeVeque: Four or five.

The Court: Four or five. All right. Tell me who they were.

Defendant LeVeque: They were explained to you; as far as my operation was concerned, was mostly on the water. As far as the land action, I was kept in the dark. I do not know much about it.

The Court: Tell me all you know. Who was in this, the people in this, the four or five people who were with you.

Defendant LeVeque: You put me——

The Court: Tell me.

Defendant LeVeque: I do not know what to say, your Honor.

The Court: Your lawyer cannot help you because he is occupying a very inconsistent position here.

[fol. 324] Defendant LeVeque: Through the investigation the Government knows about it.

The Court: What?

Defendant LeVeque: Witnesses—through investigation the Government knows who was with me.

The Court: I am not asking you what the Government knows. I am asking you. You have not helped the Government a bit. You have not helped them up to this moment. I am asking you now to tell the truth.

Defendant LeVeque: I never was asked any questions by the Government——

The Court: I am not asking you that. Now, tell me the truth. Tell me. Do you want to tell me or not?

Defendant LeVeque: I do not know enough. I know, but I do not know enough to tell you.

The Court: Tell me what you know. I will see whether it is enough or not. Tell me how much you know.

Defendant LeVeque: These people here or the individual seem in some way, how far I do not know——

The Court: Which people?

Defendant LeVeque: The people indicted with me.

The Court: Which ones?

Defendant LeVeque: I do not know.

The Court: What are their names?

Defendant LeVeque: People indicted in this case.

The Court: What are their names?

[fol. 325] Defendant LeVeque: Bill Kleb.

The Court: Yes.

Defendant LeVeque: And Saunders.

The Court: Yes.

Defendant LeVeque: And Nardone.

The Court: Yes.

Defendant LeVeque: And the captain of the——

The Court: Give the name of the captain, too.

Defendant LeVeque: Captain Ducos.

The Court: Who?

Defendant LeVeque: Harry Ducos; George Conrad.

The Court: Yes.

Defendant LeVeque: That is the only one I know.

The Court: Look at these defendants. How about this man over here (indicating)?

Defendant LeVeque: I know Mr. Gottfried.

The Court: Was he there, Mr. Gottfried?

Defendant LeVeque: I do not think he had any part in that.

The Court: You do not think so?

Defendant LeVeque: As far as I know. I was kept in the dark.

The Court: Would you say who kept you in the dark?

Defendant LeVeque: I was not told what was there, so far as the operations were concerned.

The Court: Are you willing to take the witness stand when the jury comes back and tell them the whole truth?

[fol. 326] Defendant LeVeque: All right. What I told you just now is the truth.

The Court: I want all. You say Nardone was in this matter with you? You said that?

Defendant LeVeque: Yes, sir.

The Court: How about the other two men, Brown and Callahan?

Defendant LeVeque: I only saw Mr. Callahan once, about a year ago.

The Court: What was that about?

Defendant LeVeque: He wants to sell a boat, and I met him through Mr. Velez. Mr. Velez met me and says, "I know a man who wants to sell a steamboat."

The Court: Who did arrange with it?

Defendant LeVeque: I do not know.

The Court: What did you have to do with it? What part did you play?

Defendant LeVeque: The part I played I gave orders to the Isabelle H.

The Court: Gave orders to whom?

Defendant LeVeque: Isabelle H, an outside boat.

The Court: Who did you arrange it with? Did you give orders about the Isabelle H? Who did you talk to about it?

Defendant LeVeque: Well, just what I told you a few minutes ago.

The Court: No. Who did you talk to about it? Who did you talk to? Who did you talk to?

Defendant LeVeque: Yes, your Honor, I understand you, if I can find time to answer it.

[fol. 327] The Court: Can you answer that?

Defendant LeVeque: Yes.

The Court: You know this was an arrangement to smuggle into the United States liquor illegally?

Defendant LeVeque: Yes, I know that.

The Court: It was not done by you alone, was it?

Defendant LeVeque: No, sir.

The Court: There were a lot of people in it?

Defendant LeVeque: Some, yes.

The Court: How about these money orders? Did you send them money?

Defendant LeVeque: I sent some.

The Court: Why did you use Mr. Halle's name?

Defendant LeVeque: I never used Mr. Halle's name.

The Court: Who did?

Defendant LeVeque: I do not know who did, your Honor. I never used somebody else's name.

The Court: You know about Mr. Halle's connection with these telegrams?

Defendant LeVeque: Yes.

The Court: Who used it?

Defendant LeVeque: Mr. Erickson made it, Erickson, and he used to send money orders.

The Court: What name did you use?

Defendant LeVeque: Durant.

The Court: Is there anything else that you want to say? Do you want to make a clean breast?

Defendant LeVeque: Yes, I do.

[fol. 328] The Court: You have not yet. If you want to make a clean breast, tell about those people who were in it, will you?

Defendant LeVeque: I was one of the principals, your Honor.

The Court: What?

Defendant LeVeque: I was one of the principals.

The Court: All right. Who were the other principals? Who were the other principals?

Defendant LeVeque: It is very hard for me.

The Court: All right. Stand aside. We will take a recess.

Mr. Halle: May I make a statement?

The Court: We will take a recess.

Short recess.

(The jury returned into the court room and the following occurred in their hearing:)

(Exhibits 34 and 67 for identification received in evidence.)

Mr. Gallagher: There is another question that follows:

The Court: Which one?

Mr. Gallagher: 34 and 67, both.

The Court: Let me have 67 and 34.

(Discussion at the bench, between Court and counsel.)

Mr. Gallagher: I assume it is conceded by the Govern-
[fol. 329] ment that 34 came off the Pronto and 67 is an analysis of 34, is that right?

Mr. Dunigan: There is no question about it.

Mr. Gallagher: If that is a fact, then I respectfully submit to your Honor that the introduction of them into evidence, or, rather, will the Government also concede that an indictment for conspiracy was found in South Carolina against this defendant, whom I represent, together with others, which indictment charges a conspiracy originally on August 15th, 1935, and continued up to this trial date? Or, in other words, up to the date the indictment was found, which was after March 17th, 1936, and it is conceded and it now shows by the introduction of this exhibit that two conspiracies were charged.

The Court: There is no proof about any conspiracy here. They can conspire once with other people, but they have another conspiracy with reference to the same matter by these people. For instance, 9, 10 or 11 can conspire to do certain thing. That would be one conspiracy. If H, B and D again conspired to do something, that would be another conspiracy.

Mr. Gallagher: That may be correct. That is correct. I want your Honor to take judicial notice of the facts con-

cerning that, that an indictment was found in South Carolina.

The Court: I cannot take judicial notice of that. I cannot. That is not before me.

[fol. 330] Mr. Gallagher: We have the record here.

The Court: You should have raised that in some way, on a motion or some other way. I haven't the question before me. I will receive them in evidence.

Mr. Gallagher: Exception.

(The following occurred in the hearing of the jury:)

Mr. Dunigan: As I understand it now, your Honor, all of these conversations that were not read but which were included in the exhibit are in evidence?

The Court: Yes.

Mr. Dunigan: I think with that the Government will rest its case. That is all, Mr. Kozak.

The Court: Is that all of this witness?

Mr. Dunigan: Yes.

Mr. Gallagher: May I have an opportunity to examine the rest of the messages they claim are in this particular exhibit now, before we cross-examine this witness on them? I do not know what is in there.

The Court: Certainly.

Mr. Gallagher: May I take them?

The Court: Certainly. You want to cross-examine him?

Mr. Gallagher: I do not know until we read these.

The Court: You have already examined them as to the identity of the voice and so on.

Mr. Gallagher: With reference to these we have only examined the first three.

(Discussion at the bench off the record.)

[fol. 331] Afternoon session.

(The following occurred out of the hearing of the jury:)

Mr. Halle: Mr. LeVeque would like to talk to you, your Honor.

Defendant LeVeque: Your Honor, you asked me this morning and took me by surprise and asked me who was here involved with me in this conspiracy.

The Court: Yes.

Mr. Nolan: I did not hear him.

Defendant LeVeque: These defendants now were with me in the conspiracy.

The Court: All of these defendants?

Defendant LeVeque: No.

The Court: What did you say?

Defendant LeVeque: Nardone——

The Court: Yes.

Defendant LeVeque: —was in this conspiracy.

The Court: Anybody else?

Defendant LeVeque: As far as the activity of Mr. Callahan, I had no business with him whatsoever.

The Court: What?

Defendant LeVeque: I never made any transaction with him. I met him about a year and a half ago. I was used by this witness, Mr. Velez. He asked me if I want to buy a boat somehow. I says I was broke, no money, I was not interested. That is the last time I seen Mr. Callahan. As far as the other defendants like Erickson, he was involved the same with me on this conspiracy.

The Court: Who was involved?

[fol. 332] Defendant LeVeque: Erickson. That is all, your Honor.

The Court: What?

Defendant LeVeque: That is all, your Honor.

The Court: Anything more you want to say? Is that all you want to say?

Defendant LeVeque: That is the only thing you asked me.

The Court: All right, sit down.

Mr. Nolan: I did not hear what he said.

The Court: All right. Read it. It is not part of the trial.

(Record read by the stenographer.)

(The following occurred in the hearing of the jury):

JOSEPH A. KOZAK, resumed the stand:

MOTIONS TO STRIKE AND TO DISMISS

Mr. Gallagher: No cross-examination. But we do move to strike out from the record any and all telephone transcripts of messages received and intercepted, not only on the original grounds, but it now appears from the testimony of these transcripts of these messages that there is absolutely nothing connecting the defendants with any particular overt acts or conspiracy as charged in the indictment.

And further, that all of these telephone messages were prior to March 17th, 1936, and apparently, upon the face of them, show absolutely with reference to some other matters and not connected with anything in the indictment or the issues in this case.

The Court: Motion denied.

Mr. Gallagher: Exception.

[fol. 333] Mr. Nolan: The only objection I want to make, because my clients are not involved, is that these conversations are not all admissible because nobody can testify as to the proof—there is no proof relating to my clients and because they are not identified, if they are charged with a part as to the conspiracy. I object to all the testimony of this witness and the witness Picarelli and ask that it all be stricken out on the ground there is no evidence by the Government that the very words and the individuals whose names have been used have been proved to have any connection showing that the wire running through this building has been tapped, or through any other building. I make that as a general objection to protect my clients' interests.

The Court: Motion denied.

Mr. Nolan: Exception.

Mr. Gallagher: May I move to strike it out in so far as it refers to my defendant, any such conversations?

The Court: Yes.

Mr. Gallagher: Exception.

Mr. Dunigan: Just one additional point and that is in regard to the stipulation. I do not know whether your Honor wants it read.

The Court: Yes, that may be read. Does the Government rest?

Mr. Dunigan: With that exception.

The Court: That is in. You may read the stipulation.

[fol. 334] (The stenographer read as follows:)

"The defendants will stipulate that if a witness were called from the Custom House he will testify that no invoice was filed of the merchandise on the Southern Sword on March 17th, 1936, and that no entry of the alcohol aboard the Southern Sword was made or filed with the Collector of Customs on March 17th, 1936, or any other date thereafter up to March 20th, 1936; that the defendants do not admit that any alcohol was brought to the Port of New York on the Southern Sword."

Mr. Gallagher: I move to strike out the second count of the indictment, to wit, the possession of alcohol. There is absolutely no evidence in this case at all that the defendants ever came into possession of any of the goods smuggled into the United States after they had been smuggled in.

The Court: Make all your motions.

Mr. Gallagher: I also move to strike out the first count of the indictment on the ground that there is no proof that this defendant ever smuggled any of these goods into the United States or assisted in any smuggling.

On the further ground that there is no proof that the goods entered came from a foreign port.

On the further ground that there is no proof that the goods entered were subject to entry or tax.

[fol. 335] On the further ground that there is no proof that these goods as entered, as alleged in the indictment or charged in the indictment, were in classes or classifications subject to tax or duty.

I now renew my motion to strike out the third count of the indictment, which is the conspiracy count, on the ground that same does not state a crime. These charges allege a violation of Title 18, Section 88, U. S. C. A. That is not a violation of law. I take it that that section is not the statutory section describing and defining a crime, but the penalty section fixing a penalty. Reference should have been made to another section. There is such a section describing what the crime would be.

I move to dismiss the third count of the indictment on the ground that the Government has failed to prove that this defendant, Nardone, financed the purchase of these goods, or assisted in financing the purchase of these goods, in foreign countries;

I move to dismiss the third count on the ground that the Government has failed to prove in this particular case that any distilled spirits were smuggled in. The charge in the indictment is as to distilled spirits. Such proof as has been offered over objection has been only to the effect that alcohol was brought in some place. The definitions of the two words are radically different. Alcohol is not classified as a distilled spirit. Distilled spirits are the words named in the indictment.

[fol. 336] I move to dismiss the indictment on the ground that no single overt act tending towards the consumma-

tion of the conspiracy has been proven to have been committed by the defendant Nardone.

I have other motions to strike out. Shall I go right along, your Honor?

The Court: Make them all.

Mr. Gallagher: I renew the motion to strike out all testimony with reference to telephones, telegrams and money orders, on the ground that same have not been connected with this defendant.

I move to strike out all of the testimony relative to telephone conversations had by anyone not in the presence of this defendant, with Ducos, Bellman, Adams, Kleb, Saunders Hoffman, Erickson, Geiger and Rosen, on the ground that the indictment specifically states that those that I have named are not named in the indictment as defendants herein.

I renew my motion to strike out the testimony with reference to telephone conversations on the ground that they specifically show, if anything, alleged transactions by the defendant on other grounds not connected with an attempt to smuggle liquor into the United States, or alcohol into the United States and in no way connected with any overt act on the part of the defendant Nardone so far as the alleged statement in the indictment is concerned.

I move to strike out the testimony with reference to seiz- [fol. 337] ure of the Pronto on the ground that it was seized outside the jurisdictional waters, to wit, 7½ miles off high-water mark.

And also on the further ground that the bill of particulars demanded herein specifically alleges an attempt to smuggle in intoxicating liquors on the Southern Sword, whereas the exhibit offered on the trial is alcohol.

I also move to strike out any and all testimony with reference to the Pronto on the ground that there was absolutely no smuggling of any goods on the coast of South Carolina or elsewhere, so far as the Pronto was concerned, as the evidence specifically disclosed that the Pronto, while outside jurisdictional waters, was seized by the Coast Guard and they took charge of the Pronto and its cargo while the cargo was still outside jurisdictional waters, and if anybody brought any of that cargo in it was the Coast Guard that brought it in.

I also move to dismiss on the ground that it affirmatively appears by the evidence introduced by the Government, that because of the alcohol from the Pronto that there are two separate conspiracies for which the defendant is now being brought to trial and evidence has been offered in each one of those alleged conspiracies. The original indictment was for one conspiracy and when the Government seeks to go into two conspiracies, offers evidence on two conspiracies, it is an invasion of the defendant's rights and places [fol. 338] him upon trial for an act not charged in the indictment and is prejudicial and injurious to his rights.

I further move to dismiss so far as the defendant Nardone is concerned on the ground there is not one scintilla of evidence in the entire case showing any overt acts committed by the defendant Nardone during the period covered by the indictment which would go toward the consummation of the conspiracy or to aid or abet the conspiracy itself or the acts named by the indictment as to the conspiracy.

The Court: Are those all the motions? All denied.

Mr. Gallagher: Exception.

Mr. Halle: On behalf of the defendant Gottfried, I renew the motion made during the trial to strike out, which the Court said he would take under advisement subject to connection, upon the ground that the evidence was objected to during the trial, and was not connected with the defendant Gottfried.

The Court: Motion denied.

Mr. Halle: Exception. I move to dismiss Count 1 of the indictment upon the ground that there has been no evidence adduced here at this trial connecting the defendant Gottfried with the offense charged in Count No. 1 of the indictments; and I make the same motion with reference to the second count; and with reference to the third count I move to dismiss upon the ground that there has been no evidence [fol. 339] in this case connecting the defendant Gottfried with the crime charged in that count of the indictment.

The Court: Those are all the motions? Motions denied.

Mr. Halle: Exception.

Mr. Gallagher: May I add that I renew all motions made during the trial?

The Court: Yes. Motions denied.

Mr. Gallagher: I ask for a ruling on them in favor of the defendant.

The Court: Motion denied.

Mr. Gallagher: Exception.

Mr. Nolan: On behalf of the defendants Brown and Callahan, I ask leave to renew all objections made on the trial and the exceptions taken thereto and I note an exception on behalf of Brown and Callahan to all of the testimony that has been given under the ruling you gave that reservations could be made and would wait until the end of the trial.

As far as the motions to strike out, on behalf of Brown and Callahan, I ask that the testimony of the witnesses Hauser, the first witness, as to the Steamship Reidan, Lieutenant-Commander Griffin and Lieutenant-Commander Jordon, Lieutenant-Commander Zoole; also he has in parentheses Maloney, in the Government record, which is the record which the District Attorney gave to your Honor, stating what they would testify to; I think it is in parentheses Parrot, Manerman and Nilsson, and all of the operators of the telephone company and the telegraph com- [fol. 340] pany be stricken out upon the ground that there has been shown no connection of these two defendants, Callahan and Brown.

May I have a ruling on this particular motion?

The Court: Make all your motions and I will dispose of them.

Mr. Nolan: I move that all the testimony of Mathiasen, both Conrad and Ludwig, John A. Hunt, Pike, Geary, Sellis and Martin, be stricken out as showing no connection whatsoever with the defendants, Callahan and Brown; that the testimony of Picarelli, the Government investigator on wire tapping and the testimony of Martin and the last man who testified, Mr. Kozak, be stricken out on the ground there is no reference to Callahan or Brown in connection with any of these conversations; and on the further ground that there has been no proof that the actual wires were tapped. All the other testimony given in connection with the case, in which the names of Callahan and Brown have not been included, should be dismissed.

I move also as to the witness Velez and the witness Babbidge, that their testimony be stricken out on the ground that there is no connection between them and the defendants, Callahan and Brown; which would show the importation in the Port of New York of anything that involved a matter which required the filing of an invoice, the filing or

recording of a manifest or the payment of any duties. I [fol. 341] ask that the Government's exhibits, I do not know the numbers, which involved the goods from the Pronto, be stricken from the record upon the ground there is no connection between them and the defendants, Brown and Callahan.

The Court: I think that is 34 and 67.

Mr. Nolan: 34 and 67, in that it is not connected with Brown and Callahan or with the Steamship Southern Sword.

The Court: The motions are denied.

Mr. Nolan: On the indictment itself, I ask that the first count of the indictment be dismissed and the jury directed to give a verdict for the defendants, Brown and Callahan, upon the ground that the indictment itself provides that the defendants in conjunction with others did unlawfully, wilfully and knowingly and with intent to defraud the revenue of the United States, smuggle and clandestinely introduce into the United States without making a dutiable entry consumption thereof at the Customs House of the Port of New York of certain merchandise, upon the ground that the Government has failed to prove that the defendants, Brown and Callahan, unlawfully, wilfully and knowingly and with intent to defraud the Government, did introduce such merchandise into the United States.

The Court: Have you made all of your motions?

Mr. Nolan: No, sir. On the second count I ask that the indictment be dismissed and the jury be directed to give [fol. 342] a verdict *for the defendants upon the ground* that the Government has failed to prove that the defendants did knowingly and fraudulently receive and conceal the transportation and concealment of certain merchandise which had been imported into the United States, and on the ground that the *evidence* fails.

As to the first count, I should say this: The testimony has been that the merchandise was received, and this is from the defendant Velez, outside of the United States, and I do not think you can possibly ask this jury to hold the defendants, Brown and Callahan, on the second count of having possession. The first count of bringing, I think you well know the law, and I think that should be dismissed, too. The second count should be dismissed upon the ground that it is contrary to law.

On the third count, the conspiracy count, I ask that it be dismissed as to the defendants, Brown and Callahan, and the jury directed to bring in a verdict of acquittal for the reason their names have not been mentioned at all, and there is no evidence before this Court showing that they have been guilty of or a part of any conspiracy that has been attempted to be testified to.

The Court: Are those all of your motions?

Mr. Nolan: Yes.

The Court: Motions denied.

Mr. Nolan: Exception.

[fol. 343] HUGH BROWN, one of the defendants, called in his own behalf, being duly sworn, testified as follows:

Direct examination.

By Mr. Nolan:

I am one of the defendants in this case. I have had a master's license four or five years, but I have been a pilot, which entitles me to command a vessel for the last fifteen years. My captain's license covers unlimited oceans, the United States waters from Cape Spencer in Alaska to Penobscot Bay, Maine.

I never had a collision with any ships I commanded, and never had the slightest accident. Nor has anything been done against any ticket I hold, given by the Government, and no charges against me on any ticket.

I was on the Southern Sword on March 16th and 17th and for some time prior thereto. I joined the Southern Sword in New London, October, I think it is, 20th, 1935, as chief officer. The captain was Captain Pendleton. I stayed with the Southern Sword until it was seized on Saturday, March 20th, when I was arrested. The Southern Sword was seized at the same time by the Coast Guard, in Stapleton, Staten Island, on Saturday, March 20th, about noontime. When the Customs men came on board, they took me into custody; not right away; they took possession; we were not allowed to go ashore. They took me ashore that night. I do not know exactly what time it was; after supper. I did not figure what time it was after they once took me,

or what hour, they took all my papers and personal possessions, including my sextant. That was my own. I have not got that back yet. I could not say whether they took [fol. 344] all the navigating instruments on the ship, but they took my personal papers.

I was chief officer until Captain Pendleton took his vacation about the first week in March.

The Southern Sword was engaged in the coastwise coal trade, practically coal; running out of the Virginia Capes and down east. The tonnage is 2606 gross tons. She was sailing down east, from the Virginia Capes up to New England or down to New England. We made New York, Bridgeport, New London, New Haven, Boston and Eastport, Maine. On the way down we did not make any other stops after we delivered the cargo, at any other port than I mentioned. We went from Newport News.

I say I was in Captain Pendleton's place when he was on vacation, and, while I was aboard that ship I was engaged as pilot still. For certain ports where Captain Pendleton was not licensed for, I acted as pilot. I had a fuller license than he did. When he was on his vacation, first week we left Boston, I became master, acting master.

Coming down to the Virginia Capes, we came back this way before the 16th of March. It took, for the trip from the Virginia Capes up to Bridgeport, about 48 hours; 60 hours, if it was last winter, like last winter, it took longer. The speed of the ship all depends on the weather. Sometimes we made 7. I had one trip we did not make 2. We ran into a storm.

I am not speaking of knots. Knots represent a little bit more than a mile. I mean speed in mileage per hour; it does not mean actually the distance. I would say in clear and good weather as to the speed when I was either in com- [fol. 345] mand or as first mate, that, loaded, we made around 8 miles an hour; and light between 9 and 10.

I remember the voyage that started at Newport News sometime around the 15 or 16th of March, 1936. Our ship had already been sold to a foreign buyer. I heard rumors to that effect on March 16th. I had been told that the ship had been sold—I heard rumors to that effect. Captain Pendleton was not in Norfolk at the time, we were in Newport News. Captain Pendleton took charge again the day we left Boston—no, it was Newport News.

The Court: You were in charge of the ship from what time until what time?

The Witness: From March 4th—well, I do not know the date exactly; March 4th, the first week in March, until Captain Pendleton returned from his vacation.

That was February, about the first week in February; must have been around the 11th of March, your Honor.

When Captain Pendleton took charge again we were in Bridgeport. We went down to Newport News, and I was first mate. At Newport News I was told the ship was being sold to Italians. I heard rumors to that effect. I did not inquire about it. There had been rumors before to the same extent. I was told to take the boat and come back to Bridgeport. I was told to take charge again on the evening of March 15th. I was told that I was to take charge again, not on the evening of March 15th; I went uptown, and when I came back the next morning, I was told to take charge.

I was told that Captain Pendleton was going back to New York to arrange the statement of the ship's expenses, so [fol. 346] delivery of the ship could be made. I understood he was going to make up the pay roll.

The ship took on, at Newport News, a cargo of coal for the Old Colony Coal Company in Black Rock Harbor, next to Bridgeport; around 3,000 tons. We left Newport News in the morning about eight or nine o'clock, and proceeded towards New York.

Something unusual happened on the voyage up to New York. I went up near the Winter Quarter Light Vessel, and a vessel approached my vessel and hailed the vessel, hailed the Southern Sword. I walked to the wing of the bridge and they helloed, "Are you the captain?" I said, "Yes." "Well, we want to speak to you." I says, "Come nearer so I can hear you."

I slowed the vessel down. They came near and they said, "We got orders from your owners to put some cargo aboard your ship. At New York you will get your papers. In New York a boat will come and meet you and give you your papers and your destination. We know you haven't got any wireless, and that is the reason they could not notify you."

That cargo—they said the cargo was held in Norfolk, that is the reason they could not bring it.

I said, "Come alongside." I had the mate called, Mr. Velez. I says, "What is this all about?"

He says, "It is all right. I know these people." I said, "Will you take care of the cargo then?" So I stayed on the bridge looking after the navigation of the ship and he loaded the cargo. I says, "What is it?" He says, "It is shellac."

[fol. 347] Right after the cargo was aboard we proceeded north. It got foggy. We were at the Scotland Light Vessel. There were six or seven vessels I passed, held by the fog. I had to get to Bridgeport, and I had to make the tide. I cannot get in Blackwell, in the stream, at high tide. I had to get the top of the tide to get in there. It paid me a lot even if they did get uncivil or had to anchor off Bridgeport—than anchor off Scotland Light. I proceeded in. Several vessels followed me in. I was the first vessel to start. I proceeded into Ambrose Channel and got through the Narrows. The Coast Guard boat came up, whatever it was, read my name and sent the headlights of the ship astern. When they came astern they called up. The boat was hailing me, a tow-boat. They hollered. I said, "I cannot understand you." So they came alongside the main beam port. I went off the bridge and the boat took——

The Court: What man was it?

The Witness: I could not tell. He had an overcoat on and it was raining. He said, "Are you the captain?" I said, "Yes."

He says, "You will go to Pier 72." He says, "I am in a hurry. Mr. Callahan will be there with the papers."

I proceeded to Pier 72 and docked without any assistance.

The Court: What time was that?

The Witness: About close to midnight. After we had docked, I asked the man on the dock—I said, "Where is Mr. Callahan?" He said, "Mr. Callahan is in the front of the dock." He said, "He will be aboard in a few minutes." So I went back aboard again and I told the mate to [fol. 348] discharge the cargo, and I lay down—and told him to have me called the minute Mr. Callahan comes aboard or the minute the cargo was off. You know in these coastwise vessels, you have not got, you do not enter her on clearing. That is not necessary, to enter in the Customs House.

I met the mate of this boat—then the chief mate, Mr. Velez, told me, "These people are all right; the boat I know, I used to be master on the boat. I have met them; it was an American vessel, looks to be an American license. They put on foreign commerce trade, coal. But not coastwise."

The mate told me about the American license and he told me he was formerly captain of that vessel. He says, "I used to be captain of that ship. It is all right."

The Court: What is the mate's name?

The Witness: Velez, V-e-l-e-z.

And that captain of the ship said when he hailed me that he was too late with the cargo at Norfolk and he told my owner—he had communicated with my owners, who said to bring this aboard my ship.

He said he knew we had no wireless equipment. There was not wireless on the boat, not at that time; wires up but no wireless operator.

After the cargo was unloaded at New York, I did not see Mr. Callahan. I did not see him down the bay. No, they told me on the dock, the papers and the cargo was to be delivered, and he would see me again; he was in a hurry. That is what they told me, yes, sir, that is what Mr. Velez told me when he woke me up. I was never called until the cargo was off. Mr. Velez told me.

[fol. 349] I did not see Mr. Callahan. All the information I got was from Velez, from my mate. That is what he was doing, discharging the cargo.

I got the information from the mate that the boat, the Isabelle H, was all right and he was formerly a captain and he knew the captain and it was all right for me to take the cargo on. If I had thought that that cargo had come from a foreign boat, I would not have taken it on board. I would have had nothing like that come alongside of me.

When the captain of the boat came alongside and said he had this cargo and I sent for Velez, I asked him what he had. I asked him what he had and he said shellac. He said close to 2,000 cases. I do not know the exact amount.

The Court: Did it look like exhibit—what is that number?

Mr. Dunigan: 34.

The Court: Take a look at that. Look at it.

Q. It did not have any marks on?

(The witness leaves the stand and goes down into the courtroom.)

The Witness: I do not know. There were no marks on it.
The Court: Did it look like that?
The Witness: No, sir—something similar to that.
The Court: All right.

I think it was a little larger. They said close to 2000 cases, I was in court when Velez, the Filipino boatswain, said something about cases there and the man said 1800. [fol. 350] That is what he said, and what he said aboard the ship was, he said close to 2000. They helloed up to me. I was up on the bridge and Velez was with me at the time. Velez and I probably heard it, said they said there were 1600. The captain of the ship says close to 2000.

I saw Government's Exhibit 58 and read the back and I looked at the front and I have seen that card before. It was stuck in the mirror of the side port, in the officers' messroom. It was there very likely around two months. Of my knowledge, not from recalling something, I say from my own knowledge it was there prior to March 16th, 1936, at least a month. There were no instructions about it, only when we came into port and we wanted to call up Mr. Callahan we got the telephone numbers from it where to reach him.

The Court: What did Mr. Callahan have to do with this?
The Witness: It is Mr. Callahan, if we need any ice, any water or trouble with the water bill, we can call him up and let him straighten it out.
The Court: On the boat?
The Witness: Yes.

He was president of the company that I was working for. One phone was his house phone and the other was his mother's phone; if he could not be reached at one place he could be reached at the other. At the time I did not know about the other telephones. I only know I could reach him with the New York City telephones. If I did not get him at one I could get him at another. As far as these telephone numbers are concerned, if I could not get Mr. Calla- [fol. 351] han I was to go in Gilbert's Coal Company in New Haven and ask to have them call the number. When Mr. Callahan answers the call to me I am on the ship, wherever it was, I do not know.

We got that card aboard the ship. There was another card similar to it in the chartroom. I was on board on March 20th, 1936, when the Government officers came and seized the ship.

Mr. Nolan: May I have the chart which the Government offered in evidence, Exhibit 64, on which there has been marked in red pencil, "Winter Quarter Lightship"?

(Document handed to Mr. Nolan.)

Q. Is this the one that had Winter Quarter Lightship on it?

A. No.

The Court: The captain says no.

Q. That exhibit, when did you look at that?

A. I do not know.

Mr. Nolan: I would like to have the one with "Winter Quarter Lightship" marked on it.

(Document handed to Mr. Nolan.)

Mr. Nolan: I want the one that had the red pencil marking that the witness testified to, the one that had the circle around it.

Mr. Dunigan: There is no testimony that there is any red pencil. It was a black pencil, a small circle. That is the one that we had.

Mr. Nolan: Hand it to me.

Mr. Dunigan: I showed it to you before.

[fol. 352] The Court: What exhibit is that?

Mr. Dunigan: 64.

Mr. Nolan: 64. May I see those other charts?

Q. Captain, will you look at Exhibit 64 with "Winter Quarter Lightship" marked in black pencil and tell me whether or not that is you handwriting?

A. Never used that chart since I have been aboard the ship. We did not use that chart at all. That is not a coastwise chart. That is a general sailing chart.

The Court: Did it come from your vessel?

The Witness: I doubt it, because I marked all the charts—printed, not written.

As a matter of fact this chart, these types of charts are sold by the United States Government to anybody. That is a general sailing chart. That is not a coastwise chart.

Never used that chart while I was aboard that ship.

While I was either first mate or captain of the Southern Sword, came into New York Harbor before this particular night of March 17th that the Government is talking about, I did either as captain or chief mate of Southern Sword come into New York Harbor at any time prior to March 17th, 1936. Yes, sir. I did on other trips besides the trip that the Government has testified about here pass Winter Quarter Lightship a good many times on the Southern Sword. On both the up and down trip, passed within two or three miles—two miles, two and one-quarter, three miles, five miles, sometimes.

I did not know that that was alcohol that they loaded on [fol. 353] the S. S. Sword out there. If I had known it I would not have brought it into New York. It never would have come aboard. I know that the ship got into New York on March 17th after four o'clock at night after the Customs House was closed, yes. After it was unloaded I was assured we were going to get the papers; I understood that Mr. Callahan had them.

I learned later on that was not a fact.

By the Court:

Mr. Callahan had the papers. I did not get them. I arrived about 12 o'clock. When Mr. Callahan did not arrive I had the mate discharge my cargo, then I went to bed. When I was called and the cargo was there, I proceeded on my voyage. I had not seen Mr. Callahan. I did make effort to get in touch with Mr. Callahan.

By Mr. Nolan:

As a matter of fact it is the mate's duty to handle, load and unload, the cargo, he is under my charge, but it is his work. That is true on all vessels; on all ships. Velez was the mate.

When they were loading the cargo down at Winter Quarter Lightship I did smell something. It smelled like shellac. None of the cargo broke when I saw it, not that I seen.

When they were unloading in New York I was not there. I assumed I would get my papers. After the ship left New

York I say I did not have the papers. You know what steamships pay you. I am not paid 20 hours out of 24. I am in charge and I got to take it at Norfolk and during the time I must be on the bridge. However, I got five or [fol. 354] six hours out of 24. On the way from New York all the way to Bridgeport I must be on the bridge. I am the pilot to take the ship.

All Velez told me was that Mr. Callahan or somebody else had the papers. On these coastwise ships the papers are handled in the office; call the company and they handle the papers in their office. A coastwise vessel does not make an entry of the ship or manifest. If any papers were delivered by a consignee in that case it would go to the mate, first mate, and he would get them.

The mate told me he did not get them.

Prior to March 17th, 1936, while I was captain or first mate of the Southern Sword, the Southern Sword come into the Harbor of New York on other occasions a month prior.

Cross-examination.

By Mr. Gallagher:

Up to the time of my arrest I had never to my best knowledge seen the defendant Nardone, did not know him and never spoke to him until arrested. Never saw him until I saw him in the courtroom.

By Mr. Halle:

With respect to defendant Gottfried I never saw him in my life until I saw him in the courtroom.

By Mr. Nolan:

Never heard these different names that Mr. Dunigan has stated, Red Saunders, Pierre LeVeque, alias Durant, alias Durand, alias George Woodrow, Frank Carmine Nardone, alias Frank Carmine, John Saunders, Harry Ducos, James [fol. 355] Bellman, Walter Adams, William Kleb, Jr., Nathan W. Hoffman, Burt Erickson, George H. Geiger, Harry Rosen, never heard them before I came *into* this courtroom. I know none of them.

When Velez, out at Winter Quarter Lightship told me it was all right, that he knew the captain of the ship, that

he had formerly been a captain of that ship himself, he meant he knew Captain Ducos. That he had been on board the Isabel H; he went aboard the other boat.

He said not to pay attention to names, they are phony anyhow. At the time he said about this captain Ducos is when he said it.

By the Court:

In the conversation I said, "Are you acquainted with these people?" He said, "I know these people." I said, "Are you acquainted with them?" He said—he gave me these names. He said, "Do not pay any attention to names because they may not be the right names." He said phony names I could not understand that. They might be using assumed names. I mean at the time, why they should use assumed names. Might be foreigners, your Honor, and make a new name out of it. That is what I meant. And the names were Edmond and Ducos.

Cross-examination.

By Mr. Dunigan:

Captain Pendleton was on the Southern Sword at the time I was on it with the exception of when he was away on his vacation. He was the captain when the boat was in New-[fol. 356] port News on March 16th. On the morning of March 16th I took charge.

Captain Pendleton himself told me to take charge. I saw Mr. Callahan down there. I had a conversation with him. He says, "You got to take it from Norfolk. Captain Pendleton has to come to the office."

It was generally rumored that the ship was being sold—then everybody had the information. Mr. Callahan did not tell me that it had been sold to the Italian Government and this was the last trip. I did not understand this was the last trip of the Southern Sword.

I was talking a moment ago about Captain Velez, about these assumed names. When he told me that, "Do not pay any attention to the names, they never use their right names," I did not talk to him any further about that.

I did not talk to Velez any further about these phony names, when he mentioned phony names to me. No, sir. I would not say it was phony names. I would say the lawyer used that expression. I would say assumed names.

Velez did not say anything about names. I spoke about names a while ago, names as far as this goes. I do not know what names he gave me. One, I think it was, Harry Ducos, but at the time I did not even get that. He said he mentioned that name. He said, "Well, do not pay any attention to the name. It might be"—he did not say might be. "Do not pay any attention to the names."

When I took on a cargo, not my regular cargo, I was interested to find out about what this was all about. Before I had a conversation with a person that was using an assumed name, I, as a good captain, would investigate [fol. 357] them. That was after the time that I had taken on the cargo. Not all the cargo. The conversation occurred when the vessel came alongside. The vessel was alongside before Mr. Velez got up.

I did not ever take a cargo on at sea before on any other occasions. Not a case like that, your Honor. When I was at sea in charge of this ship, as master of the vessel, I was not accustomed to taking orders from the mate. That is not customary in any situation. Velez was chief officer when I assumed charge at Newport.

Captain Velez, or Velez did not tell me we were going to take this cargo and that the papers would be fixed up. And that he knew these people. No, sir, he did not say any such thing. I said when the ship came alongside, the boat came alongside, Mr. Velez was still in bed when the boat came close and he told me they had a cargo for me. I says, "Come alongside." I had the mate called then because it is the mate's duty to put the cargo aboard, not the master's. Velez did not say anything at the time when he was called.

The statement that the papers would be in New York was made by the master of that vessel and Mr. Velez said something after he had been aboard that boat. I did not take orders from the mate. I did allow the cargo to be placed aboard. I inquired about the cargo myself.

I was the captain of the vessel, in sole command. I could have given orders to Velez, if I wanted to. I could have stopped the cargo from coming on board. Certainly I might. I did not stop it. No, sir.

[fol. 358] The Southern Sword did not have any radio at the time. It would not be possible for another ship to contact us after we left Newport. If we met this other vessel, coming out of the same harbor it should have been a faster ship.

It would have been possible for me to have been contacted by another ship after we left Newport.

Mr. Nolan: I object to him answering that. That line of questioning is ridiculous. Anything is possible. The Isabelle H did contact it.

The Court: Almost anything is possible. We do not deal with possibilities.

Witness continues: We were not contacted by any other vessel or any other person after we left Newport before we were hailed by this vessel.

As to these cases that I said were put on board, I said I saw cases, I saw them at a distance. Close as I am right now. The members of the crew put them on board. I had the mate turn the crew to. I did not instruct Velez to clean up the shelter deck. I did not hear him testify to that effect in court the other day.

If Captain Velez did testify that he received instructions from me to clean up the shelter deck, I cannot say that I gave the orders. It is the mate's place to keep the ship clean; he should do that without orders.

I heard Captain Velez say the other day on the witness stand that after we reached Newport and before we arrived at this Winter Quarter Lightship that I showed him a piece of paper with two names on it. I heard him testify to [fol. 359] that. I did not show him such a paper. I deny that I did that.

Q. In your experience as a captain how many times have you had occasion to stop at sea and take on cargo similar to this situation?

Mr. Nolan: I object to that.

The Court: Overruled.

Mr. Nolan: Exception.

The Court: He has already testified it was the first time.

Mr. Dunigan: First time on the Southern Sword.

The Court: Or any boat.

Mr. Dunigan: I withdraw the question.

The Court: That is what you said, isn't it?

The Witness: After it came to my mind—are you asking me if we did take a cargo? Once I was on the Bell Buckle.

By the Court:

On the coast of Africa off Nashaba, the vessel belonged to the Bull Line. Coast of Africa. The Bell Buckle was

chartered by the Bull Line. It did not belong to the same line. Chartered—still belonged to the West Oregon Line and was on the other side. I was master of the ship. It is common knowledge to have cargo delivered from one boat to another at sea. That is not unusual. If is a quite common occurrence.

At first I was—at first I was—but when Velez says, "I know these people; I used to be master on the ship," I naturally thought it was all right. At first I was afraid. These men testified they smelled alcohol. Alcohol smells like shellac.

[fol. 360] By Mr. Dunigan:

I did not see any of the cases leaking. I heard the witness Velez and Sabio testify they were leaking and they got their clothes wet. May have been; I would say they did not.

By the Court:

It's pretty unusual to deliver cargo at twelve o'clock at night, under the circumstances, as I look back. Well, there is a possibility of it they were smuggling in alcohol.

By Mr. Dunigan:

In my experience as Captain I have never taken on a whole cargo at sea and brought it into the United States. I never took any merchandise from any boat that I met at sea and brought it into the United States during my experience as a seaman. No, not outside the territorial waters of the United States.

In New York Bay a man came aboard the Southern Sword; he was brought down by a tugboat. I did not read the name but I did see a tugboat. I did not see any markings on the stack. No, it was dark that night. As captain of the boat certainly I was interested or concerned with who this person was that came on board. He did jump aboard and holler at me, but he was below. I was up on the boat deck. He was down below, there are steps higher up. Then he says—he says that the tugboat is in a hurry. He says, "Go to 72." I hollered back, I did. I said, "Where is Mr. Callahan?" He said Mr. Callahan will be on the dock with the papers.

[fol. 361] By the Court:

Q. Did he get on board your boat?

A. The man came with the towboat.

He could not go as far as the boat deck. I had one quartermaster there. That was not another unusual incident. No. I stood my own watch. I don't mean that was rather unusual, under those circumstances. Every Standard Oil ship that comes into the harbor has a man who comes on board. Men come on with raincoats.

By Mr. Dunigan:

My experience or my understanding of the situation down at Winter Quarter was not that I would be met by Mr. Callahan at Pier 72 I did not know anything about 72.

The man on the other boat told Mr. Velez and he told me that a boat would come out like the Standard Oil, a message boat comes to every boat. That boat was to give me my docking instructions. Yes, Pier 72. I did not inquire of Captain Velez as to who this man was. I did not make inquiry from any man on that boat as to his identify, because he said Mr. Callahan would be on the dock. That was already told me, that the man would come there.

I kept a log on the Southern Sword. During my watch sometimes; the mate who is on watch does it when I am too busy.

Prior to March 16 when I assumed control of the Southern Sword, I do not know if I kept a log book. I was doing the piloting. Prior to March 16th when I assumed charge [fol. 362] I kept a log book on my watch. On the four to eight watch. Whoever was on watch kept the log book the night after we left Newport on the morning of March 16th. I am always on watch going into the harbor. I am the pilot.

I did not make any entries in that log book about taking on this cargo at sea. I did not make any entries in the log book about unloading at Pier 72, I never make any entries in the harbor. That is all harbor work.

I do not know whether or not any entry was made in the log book.

The Court: When taken at sea don't you make an entry of that?

The Witness: It did not get in.

The Court: It should be in.

The Witness: Yes, should be in.

Government's Exhibit 65 for identification. I examine this page on March 15th, 1936, and state the entries therein are in my handwriting. Yes, sir, one entry in here—two entries. This is my handwriting. I print everything. Looking at March 16th, the entries on that page are in my handwriting. Mine right here (indicating).

The Court: Printed?

The Witness: Instead of writing it, I print it. This other entry on March 16th is in my handwriting on this page.

The Court: Anything printed is in your handwriting?

The Witness: Most of it. Anything additional in my handwriting, no. Any writing on the page dated Monday, March 16th, 1936, is not in my handwriting except the printing that appears on the page.

[fol. 363] We met this boat at sea on the night of March 16th, about around 11 o'clock. Looking at the page there dated March 16th, I do not see any entries there as to the meeting of this boat. The page went over and I put it on the next page. It says, "11:15, Winter Quarter Light Vessel abeam, 3 miles off." I put that in. I did not continue and put in the log book about this cargo. I had—first I wanted to have the outcome of the cargo. We arrived in New York with the cargo about 10 o'clock, I should say; 9:50. That would be on March 17th. I find no entry with respect to Pier 72, North River. I never put in any entry of any harbor work. You would have the whole book full.

By the Court: When you made a delivery of the cargo of coal, did you make an entry?

The Witness: Only entering the harbor, entering Black Hawk Harbor, arrived, something like that.

Looking at the page dated Wednesday, March 18th, 1936, I do see entries on that page with respect to harbor work. That page contains entries with respect to docking and unloading. I did not put it in. It is not customary that it go in. As to entries made for harbor work on the preceding pages, there are none. That is March 3rd. The last entry is "In Ambrose Channel," and then the next entry here is "7:05, Section Rock, clear through New York Harbor and East River."

On these prior trips from Newport News to Bridgeport I did not state that we had not stopped in New York Harbor. On occasions, yes. On our regular run from Newport to

Bridgeport it was not our custom to dock in New York [fol. 364] Harbor any place; only on one occasion. About a month before March 17 we docked at Jersey City. On those occasions there would be harbor work to go in the log book if you navigate the vessel—— It is all harbor work. You come into Ambrose Channel. That is harbor work. You meet vessels and slow down and go full speed; you meet them and go astern, if you come upon a boat, meet two or three big boats, go through Hell Gate, you may meet cargo barges, you meet them and go astern.

Looking at the entries for Monday, March 16th, 1936, I see entries in this book with respect to harbor work at Newport News. That page contains a full and accurate description of the loading. Some mates do it, others do not. It was under my supervision. It was not necessary. I have no entries in the book that I took on that cargo or unloaded at Pier 72.

By Mr. Dunigan: I will offer the log book in evidence. That is all.

By Mr. Nolan:

The mate always on every ship makes any entries that are necessary in the log book about cargo; not the captain.

The Court: You do check it and see that the log is made correctly under your orders?

The Witness: I did not. There is a rule about checking the smooth log.

A Juror: What was the answer?

The Court: Read the answer.

(Record read by the stenographer.)

The Court: Is that a smooth log?

The Witness: No, sir; that is the rough log.

The Court: Where is the smooth log?

[fol. 365] The Witness: I do not know. They took everything off her aboard the ship.

(Government's Exhibit 65 for identification was received in evidence.)

The Witness: It is customary to leave coal—on a coal vessel we come alongside the dock. There is a chute put in the hold of the ship and is entirely loaded from the dock.

The first mate or master, he has got very little to do with any of the loading of the coal, very little to do. All we got was a statement so much coal, saying it is good. There is a coal chute. It comes in automatically, dump a whole cargo at a time.

By the Court: We are not dealing with coal.

The Witness: The mate and the master has got very little to do with the coal until the coal is entered and the other cargo is finished. They come with papers and you sign them. That is all there is about it. The paper work is all done by the office.

By the Court: The log is supposed to be a finished record of what has occurred on the ship in the course of the voyage?

The Witness: Yes, sir.

By Mr. Dunigan:

Going back to the entries on March 16th, 1936, my testimony has been that there are entries on that page in my handwriting. I gave the course and he checked it. As a rule I told them to put in what time we passed the light vessel. For instance, on March 17, 1936, there is "7:25, five fathoms light vessel, distance 1 mile." I give the mate the course, whatever time we pass near the light, and he put it down in the log. This "11:15, Winter Quarter Light," on March 17th, is my handwriting. I put in "Win-
[fol. 366] ter Quarter Light, March 17th." I know on the 17th I was off some distance, and that should have been there. The only reason that I can give as to why it was not put on the page where it should have been is that that page blew over there, I guess. I did not see the name of this vessel that we met at sea. She did not fly any flag. I had a general look at it, a general look. It was a low vessel, built low, a coast boat. Taking a look at Government's Exhibit 5 in evidence, I could not positively swear, but it is something like it. I made no effort to find out what this particular boat was or who she belonged to. Velez said, "I used to be on her. She is all right."

Q. You took the first mate despite all these strange incidents?

A. That is no orders.

Q. You allowed them to load cargo on the vessel despite the unusual things you told us about?

A. It was not advice he gave me; it was not orders.

AUSTIN L. CALLAHAN, one of the defendants, called in his own behalf, being duly sworn, testified as follows:

Direct examination.

By Mr. Nolan:

I am 32 years of age and an American citizen. I am manager of a steamship line. I have been connected with many different businesses in the past six or seven years—three or four. Originally I was in the trucking business under the name of Austin L. Callahan Transport Company; and then I was in the welding and supplies with my former wife; and then I had the Alco Loading Service and the Alco [fol. 367] Transport Lines; then in 1934 I went into the steamship business, Alco Steamship Lines, Inc. I call it the Alco in these different names, following my first three initials, Austin L. Callahan, and a "o" hung on the end. I have had these companies for a number of years and I have been using the name Alco since 1926. I mentioned my former wife. She is not interested in the Alco Steamship Lines. The other people interested in the Alco Steamship Company besides myself are Mrs. Fredia DeJong, my former mother-in-law, and Mr. George DeJong. Mrs. DeJong interested herself to a certain extent in the Alco Steamship Company after there was a divorce between Mrs. DeJong's daughter and myself. Mrs. Callahan had married another man in the meantime.

My stock in the Alco Steamship Line had been pledged to the De Jongs since the formation of the company for collaterial; to my mother-in-law and her daughter. My salary as president of the Alco Steamship Lines was $35 a week.

I did not know Pierre LeVeque at any time before I saw him in this court room; nor Frank Nardone; nor Robert Gottfried until I was arrested. I do not know Harry Ducos, James Bellman, Walter Adams, William Kleb, Jr., John Saunders, Nathan Hoffman or Burt Erickson. Erickson has been pointed out, but I did not know him. I do not know him now, nor Harry Rosen. I do know some of the individuals that have been named here before the indictment; Captain Brown. I knew Velez, who was a witness here, too.

I was in Norfolk or Newport News the early part of March, 1936. The 14th I was down in there. The 15th, is that Monday or Sunday? I was in Newport News on the

[fol. 368] 15th. I left New York Saturday, the 14th. I saw Captain Pendleton there Sunday evening, the 15th. I had been negotiating some time for the sale of the steamship Southern Sword; negotiating to sell it to the Italian—I cannot pronounce the name.

(The name referred to is Society Anonyme Italian Di Navigazione Mercantile, Villias and Fassio.)

Villias and Fassio are the English names on it. The price had been fixed for the sale of the vessel. It was necessary because it was an American enrolled vessel to get the consent of the United States Government to sell it.

After I left Newport News Sunday night following the sailing of the Southern Sword I went to Richmond, from Richmond to Washington. I had an appointment with Mr. Shell of the U. S.—1705 K Street, I think it is, United States Shipping Board; one branch of the Shipping Board. I had been negotiating with him for quite some time and the decision was to come through that week for permission to sell. I went from Norfolk to Washington to get that consent. I did not get it while I was there. It was not ready to go through. I stayed there a couple of days until this telegram of March 20 came to me; it came collect. It was the Shipping Board Bureau, not the Shipping Board.

Mr. Nolan: I offer it in evidence (handing to Mr. Dunigan).

Mr. Dunigan: No objection.

Mr. Nolan: Is it necessary for me to offer the bill of sale? Do you want that offered or will you dispute that question?

Mr. Dunigan: I do not know. If you will state to the Court [fol. 369] what the purpose is you are offering it for.

The Court: Let us mark the telegram first.

Mr. Nolan: I offer in evidence the telegram and ask that it be marked.

(Marked Defendant Callahan's Exhibit A.)

Mr. Nolan: I offer in evidence the bill of sale of the Steamship Southern Sword to the Society Anonyme Italiana Di Navigazione Mercantile, dated and sworn to on the 25th day of January, 1936 (handing to Mr. Dunigan).

I had been negotiating with the Italian people for some time. Now, coming back again to March 15th, Sunday night, March 15, in Norfolk, I saw Captain Pendleton on

the ship there. The first mate, Brown, afterwards became captain. My instructions to Captain Pendleton were to load. I asked him for some papers which he gave me to go to Washington with the ship's papers. One was an American Bureau Survey, which is necessary. I then told him to get his papers and come to New York by train. I think I had given him my half of the ticket to go home on. I went down on an excursion ticket. Unfortunately he was not able to use the ticket. And he was to make up his pay rolls and have them so that when the vessel got to Bridgeport he could come to the office, go over the accounts with me, and pay them; in fact, so that he would have enough money to bring the vessel to New York anchorage and make delivery to the Italians Saturday morning, which he did. Captain Pendleton presumably appointed First Mate [fol. 370] Brown captain. I left him at 11 o'clock on Sunday night. This is all on the 15th. He saw me off on the bus.

I did not make any arrangements with anybody for the Southern Sword to stop off Winter Quarter Lightship or any other place and take on a cargo. I did not know there was any such purpose in mind. I did not go on board the Southern Sword when they came into New York, as has been testified here, on the 17th of March, 1936. I did not go to Pier 72, North River, on the night of March 17th, 1936. I did not make any arrangements for the ship to dock at Pier 72. I did not make any arrangements for it to take on a cargo at Winter Quarter Lightship or any other place except the cargo of coal in Norfolk.

(Bill of sale marked Callahan's Exhibit B.)

Cross-examination.

By Mr. Dunigan:

I do not know the defendant Gottfried. I did see him prior to the time I saw him in this court room. I did know him before I came to court. I first met Gottfried some time in April of this year. I met him in this building. I had not seen him prior to that time. I did not talk to Mr. Gottfried over the telephone.

Mr. Dunigan: Mr. Kozak, will you read this telephone call to the jury, please, which is a part of Government's Exhibit 68 in evidence?

Mr. Nolan: That is one of the telephone messages that we were supposed to see, and Mr. Kozak did not give any testimony about anybody's voice, and I object to it being used.

Mr. Dunigan: It is in evidence. He can testify now as to [fol. 371] whether he recognized the voice.

The Court: One thing at a time. He cannot do it while the witness is on the stand.

Mr. Dunigan: I want him to read it now.

The Court: Is it in evidence?

Mr. Dunigan: Yes, it is in evidence, part of Government's Exhibit 68.

Mr. Nolan: Your Honor, the instrument is not specific. I was going to cross-examine the witness Kozak, but he did not testify he heard Callahan's voice.

The Court: You had a right to object. If you did not object, it is too late.

Mr. Nolan: I took my objection under your Honor's advice, as a general objection to the fact which was brought out.

The Court: If it related to any specific thing, you should object. What is the point of your objection?

Mr. Nolan: My understanding was that Mr. Kozak was going to identify it. Here is one he did not identify. He did not testify to it.

Mr. Dunigan: I want it used now.

The Court: Come up.

(Discussion at the bench, between Court and counsel:)

Mr. Nolan: I do not know what it is.

The Court: If you will stop talking. Come up here. I do not like to talk before the jury.

Mr. Nolan: When they put something in that I have not seen, it is a different proposition.

[fol. 372] The Court: I do not want to end it.

Mr. Nolan: I would like to see what it is.

The Court: What is this all about?

Mr. Dunigan: It is a conversation between Gottfried, where he calls Callahan's number, this number, and asks for Mr. Callahan.

The Court: Tell us what he testified about Gottfried.

Mr. Dunigan: He testified he heard Gottfried's voice.

Mr. Nolan: He has not testified to that, Kozak has not. He has not read it into the record.

The Court: He testified in answer to a question where the names of the defendants were mentioned that he recognized their voices, he said. But you did not have any objection, anything specific. That is the reason why I told you before lunch to make the objection known.

Mr. Nolan: He did testify to the man's voice, and I objected to it most strenuously.

The Court: In answer to a question I asked him, he testified where these names were mentioned that he knew the voice of Gottfried.

Mr. Nolan: But not Callahan.

The Court: It is in evidence.

Mr. Nolan: It is in evidence under a misapprehension which you unfortunately created.

The Court: No, I did not create it at all. You may have [fol. 373] misunderstood it, but I do not understand why you should have. You may read it.

Mr. Nolan: What is the date of this?

Mr. Dunigan: February 27th.

Mr. Nolan: I do not know whether it means anything or not, but I press the objection.

The Court: Objection overruled.

Mr. Nolan: Exception.

(The following occurred in the hearing of the jury:)

Mr. Dunigan: Read it, Mr. Kozak.

Mr. Nolan: Why should he do it?

The Court: You may read it.

Mr. Nolan: Let me ask the witness about that call.

The Court: You may read it to the jury.

Mr. Nolan: May I take an exception to reading it to the jury?

The Court: Certainly. You may read it to the jury.

Mr. Dunigan: Outgoing call to Hanover 2-7949 at 5:29 P. M., on February 27th, 1936.

Out, Female Voice: Hello.
In, Gottfried asks for Mr. Callahan.
Out, Female Voice: Who is calling?
Gottfried says: Mr. Gottfried. Then a pa[illegible]
And then Mr. Callahan comes and says: H[illegible]re you?
Gottfried says: I am on 46th Street. I'll be down there.
And the male voice says: All right—I'll be here waiting.
Callahan says: You are going to be upstairs?

[fol. 374] And the out-male voice says: Yeh.

Gottfried says: O K.

The Court: What is the question?

Mr. Dunigan: No question. I asked him if he had any conversation.

Mr. Nolan: I move to strike it out.

The Court: Strike it out.

Mr. Nolan: Did Mr. Kozak testify to any recognition of Mr. Callahan's voice?

The Court: I have already ruled. Do not repeat it, please.

Mr. Nolan: Exception.

The Court: What is the question, please?

Mr. Dunigan: I did ask a question.

The Court: After hearing that read, does that refresh your recollection at all?

The Witness: Yes, sir.

The Court: Now after having your recollection refreshed, what do you say?

The Witness: I still did not have any conversation with Mr. Gottfried. What was the date of that? What was the date of that?

Q. February 27th, 1936.

A. No, sir, I had no conversation with Mr. Gottfried.

The number at the Alco Steamship Company was Hanover 2-7949 on February 27th of this year, presumably that time. It was that number until August of this year.

We operated one boat. I do not know a boat by the name of Isabelle H. I never heard of the Isabelle H, not until this case was concerned.

Prior to coming to court on Wednesday of last week, I had never been to Halifax, Nova Scotia. Prior to Wednesday of last week, I had been to Yarmouth, Nova Scotia, [fol. 376] through the summer of this year. I transacted no business in Yarmouth. While at Yarmouth I did not have any particular conversation with anyone regarding the Isabelle H, nothing outside of the boat happened to be in Yarmouth and I happened to be there on a vacation with my mother. I saw it tied to the wharf down by the Canadian National Depot and looked at her. I did not talk to anyone about buying the Isabelle H.

I was the president of the Alco Steamship Lines and in that capacity I had control of its affairs, to a certain extent. All of the stock had been pledged for a loan to my mother-

in-law because she had financed the company. I was to get it back if the company was ever successful or the company ever paid off its obligations. $12,000 was put up to finance it. The total deal was $12,000. The stock was not in my name despite the fact that it had been pledged; it had been transferred. As president of the company, I determined what sort of business it should be engaged in and otherwise said how it was to operate. My brother-in-law helped down there, George De Jong, Harry De Jong, two brothers-in-law. One was in the butcher business and the other, George, helped me through the winter. They did not participate actively in the Alco in and around March of this year, they were not active at that time, no more than usual. Everything that was transacted in the form of business or finances was transacted by Mrs. De Jong.

About the boat, the conduct of any boats, I done that all through brokers. I did not do the hiring of the crew for the Southern Sword. Most of it is conducted at the time, [fol. 376] the general engineer, the engineering department. I did not originally have to do with the hiring of any men for the vessel. I did not hire Captain Brown nor Captain Pendleton. Pendleton was hired through the mortgagee and the attorneys of the company, such as was there. I knew Captain Pendleton was in command of the vessel at various times.

I left Newport News at 11 o'clock on Sunday night, the 15th; that was about 11:15 that the bus pulled out to Richmond. I did not go back to Newport News. I did not hear Captain Brown testify that he saw me at Newport News on the morning of March 16th. I did listen to his testimony a few minutes ago.

I do not recall ever meeting Pierre LeVeque in the Hotel Astor. Government's Exhibits 62 and 63 in evidence; this is my writing. The first four lines on Exhibit 62. 1, 2, 3, 4 of these first lines on 63. This particular handwriting was made by me in the treasury office of the Treasury Department on March, I think, the 23rd, about 6 or 6:30 or 7 o'clock at night in the presence of this Commander. Mr. Dunigan and Mr. Martin had me write this. I had been there being questioned about two or three hours. They would not permit me to call my office or attorney, and they compelled me to write this before I had anything, and I wrote what they told me, under pressure.

The Court: Is that your natural handwriting?
The Witness: Yes, sir.

Government's Exhibit 58 is my handwriting on that exhibit; it is on my card. It is my handwriting. I cannot explain the handwriting. I can explain my "Nyack 301; home, Nyack 453; they know where I am." On the other side [fol. 377] of this particular card is my own business card, Austin Callahan, Alco. Steamship Line, with the number. I did not give that card to Mr. Gottfried.

I heard some papers and cards were found in the flush bowl somewhere in the restaurant; just which specific ones I do not recall. I heard that they were found on March 20th of this year, this particular card. I said a moment ago that on March 20th of this year I did not know Mr. Gottfried. I saw Captain Pendleton at Newport up until probably 11:15 Sunday night. We had dinner at 9 and he waited at the bus stand for me until the bus went. Prior to that time I know he had been the master of the Southern Sword. I did not give instructions to Captain Brown to assume command of the Southern Sworn. I asked Captain Pendleton to leave the Southern Sword and come to New York because the superintendent is given the duty of preparing and paying his crew. There was three months' pay roll pending which would require possibly a day and a half clerical work to straighten out. In order to prepare the amount you are going to pay off finally, the same amount which had been brought in there to pay off; three months had been paid. They asked for the pay roll showing the payments. The pay roll amounted to about $2400 a month. I said the men had been drawing against them for several months. Some had never been squared from the 1st of February. Some had not been squared since January 1st.

I gave Captain Pendleton the return portion of my ticket for New York and had Captain Brown assume charge of the boat at Newport News. I did not instruct any other persons in that regard. When I told Captain Pendleton [fol. 378] to come to New York, this position is surrendered and the officer on—that was Brown. We were sailing under coastwise rules and did not have to put another man on. I know who took charge of the boat at Bridgeport after March 18th; I sent Captain Pendleton up there with the pay roll sheet. He straightened out his personal sheets in the

meantime and gave me a copy of those. Coming back to this conversation in regard to the meeting of this boat, I did not leave any instructions with Captain Brown at Newport News to meet this boat. Mr. Gottfried never talked to me about a boat to meet the boat five or six miles east of Winter Quarter Lightship. It isn't a fact that it would have only taken Captain Pendleton about three hours to have straightened out his accounts. I did not go down the Harbor in the Bay there and go on the Southern Sword. I heard the witness Valley say he saw me go on the boat, say he saw me, but I deny that that was so. If Valley says he saw me, I deny that is so. It isn't a fact I went on board the tug boat at Pier 5, East River, and went down to meet the Southern Sworn. It isn't a fact that when the Southern Sword was docked at Pier 72 I hollered up to Captain Brown and said, "Not Pier 74, Captain, 72."

By Mr. Halle:

I was in New York on March 1. March 1st is on Sunday; I was there. I had been down there several days (Newport News). I was at Norfolk before the ship got in on Friday. I got in on the morning of the 28th. We remained there until the ship sailed on the 2nd. It was my [fol. 379] custom to go to Norfolk when the ship was there to supervise the loading of coal. This particular time she had been staying around there because she had left Pier D at Jersey City, and I stayed with the vessel until the time it started—until she finished and was at Norfolk, until she was discharged. The log book shows she got in Norfolk on the 28th. She arrived in Norfolk on the 28th, in the morning.

By Mr. Dunigan:

I said we had made arrangements to sell the Southern Sword. This was our last trip.

Redirect examination.

By Mr. Nolan:

My mother owns a cottage at Weymouth, her private place. We go there each summer and occasionally I go with my mother and a group of friends. Five friends were

in that party and all occupied my mother's private place. Not all in one spot, she has two homes there. We went there together and, of course, I had to go through Yarmouth to get there. I knew through the newspapers and that the Isabelle H was mentioned in this case; through the newspapers.

Mr. Nolan: That is the case for the defendants, Callahan and Brown.

RENEWAL OF MOTIONS

Mr. Halle: The defendant Gottfried rests and renews all motions.

Mr. Gallagher: Nardone will rest his case.

Mr. Nolan: I would like to renew all the motions.

[fol. 380] The Court: Motion denied.

Mr. Gallagher: On behalf of Nardone I renew all motions made at the close of the Government's case.

The Court: All motions are made and denied.

Mr. Gallagher: I request you to direct a verdict of acquittal in favor of the defendants.

The Court: Let's see if the Government has rested.

Mr. Dunigan: No further evidence.

The Court: All sides rest. Everybody rests. Now you may proceed.

Mr. Gallagher: The defendant Nardone renews all the motions heretofore made on the record and on behalf of the defendant Nardone I ask the Court to direct a verdict in favor of the defendant and discharge him with a verdict of acquittal.

The Court: Denied.

Mr. Gallagher: Exception.

Mr. Halle: I make the same motion in behalf of the defendant Gottfried.

The Court: Denied.

Mr. Halle: Exception.

Mr. Nolan: I make the same motions on behalf of the defendants Brown and Callahan.

The Court: All right. The same ruling.

Mr. Nolan: Exception.

(Mr. Gallagher summed up to the jury on behalf of defendant Nardone and during his summation the following occurred:)

COLLOQUY

The Court: I won't let you say that the testimony in this case is not competent. It is material. Do not make any such statements as that.

[fol. 381] Mr. Gallagher: I respectfully submit in my opinion it is not.

The Court: I do not care anything about your opinion. You may not express such opinion to the jury. I say it is competent and material and proper for your consideration. Do not make any comment upon that.

Mr. Gallagher: May I respectfully except, your Honor?

The Court: Yes.

(Mr. Gallagher continues his summation and during the summation the following occurred:)

Mr. Dunigan: I am going to object to any remark like this. I think it is entirely improper. Your Honor has ruled on the questions of law and the motion on the bill of particulars.

The Court: Although you have the right to tell me what the law is, I will tell the jury what the law is later on. They will take instructions from me as to what the law is. I will let you refer to the fact that the bill of particulars was filed and what is in it.

Mr. Gallagher: Yes.

The Court: You won't refer to any argument before the Judge on the bill of particulars. If you wish, you may say what the Court said as to the answer.

Mr. Gallagher: May I sumbit that the bill of particulars then becomes a part of the indictment?

The Court: You may refer to it.

Mr. Gallagher: I will take the bill of particulars.

The Court: I do not know what they are going to do about that. I will take up that subject later on.

[fol. 382] (Mr. Gallagher continues his summation and during the summation the following occurred:)

Mr. Gallagher: Good character is a presumption of innocence.

The Court: Not at all, not in this court. That is the State Court rule. That is not our rule.

Mr. Gallagher: I could comment, but I will take your Honor's suggestion.

The Court: I think you better.

(Mr. Gallagher continues his summation and during the summation the following occurred:)

The Court: I won't permit that comment. The jury is not to approve wire-tapping. That is not an issue before them. You better limit yourself to the law. Go ahead.

(Mr. Gallagher continues and concludes his summation.)

United States vs. Le Veque et al.

New York, December 23rd, 1936,
10:30 o'clock A. M.

Trial resumed.

(Mr. Nolan summed up to the jury on behalf of the defendants Brown and Callahan.)

(Mr. Halle summed up to the jury on behalf of the defendant Gottfried.)

(Mr. Dunigan summed up to the jury on behalf of the Government and during his summation the following occurred:)

[fol. 383] Mr. Halle: That is not a fact, that it was amongst Gottfried's papers.

The Court: Do not interrupt.

Mr. Hall: Exception.

(Mr. Dunigan continues and concludes his summation.)

(Short recess.)

(Discussion at the bench, between Court and counsel:)

Mr. Gallagher: I did not wish to interrupt Mr. Dunigan while he was making his summation, but there are two statements that he made to which I wish to take exception. I wish to take exception to the statement made by Mr. Dunigan that "you saw this alcohol and you smelled it in the court room." As I have indicated, the exhibit here was obtained from the ship Pronto by Lieutenant-Commander Zoole, of the Coast Guard. He described it as alcohol and

said he smelled it here in the court room and said it was obtained from the cargo that was a part of the cargo of the Southern Sword.

The Court: I do not think that is exactly what he said.

Mr. Gallagher: I wish to take exception to the statement that he made that Pierre LeVeque has conspired with Nardone.

The Court: He did not say that. He said he pleaded guilty to the indictment so and so. I will take care of that.

Mr. Nolan: I take exception to the remarks by Mr. Dunigan as to the degree of guilt of Mr. LeVeque and I move to strike it out from the consideration of the jury.

The Court: If he said that, that was not improper. That is argument.

Mr. Nolan: Exception.

[fol. 384] IN UNITED STATES DISTRICT COURT

[Title omitted]

CHARGE OF THE COURT

MOSCOWITZ, D. J.:

The Court: Gentlemen of the jury: The defendants were indicted on three counts. The first count charges that heretofore and on or about March 17, 1936, in the Southern District of New York and within the jurisdiction of this Court, Pierre LeVeque, Frank Carmine Nardone, Austin L. Callahan, Hugh Brown and Robert Gottfried did unlawfully, wilfully and knowingly and with intent to defraud the revenue of the United States, smuggle and clandestinely introduce into the United States, without making dutiable consumption entry thereof, at the United States Custom House and Port of Entry with the United States Collector of Customs at the Port of New York, and without paying the duty thereon, certain merchandise, to wit, approximately 9,600 gallons of alcohol, which merchandise was subject to duty and should have been invoiced and for which merchandise dutiable consumption entry should have been made at the United States Custom House and Port of Entry with the United States Collector of Customs at the Port of New York, and that the said defendants then and there well knew that dutiable consumption entry for the

said merchandise had not been made at the United States [fol. 385] Custom House and Port of Entry with the United States Collector of Customs at the Port of New York and that no invoice for the said merchandise was filed with the Collector of Customs at the Port of New York, and that the duty thereon was not paid as required by law.

The second count charges the same defendants, within this district, on or about March 17, 1936, did unlawfully, wilfully, knowingly and fraudulently receive and conceal and facilitate the transportation and concealment of this alcohol, which the defendants then and there well knew had been imported and brought into the United States contrary to law, in that said merchandise had not been invoiced and entered at the United States Custom House as required by law, using the same language as the other count with reference to the entry and invoice, and so on.

The third count charges that beginning on or about October 15, 1935, and continuing up to the date of the filing of the indictment, and the indictment was filed May 14, 1936, in this district, that the defendants whose names have been mentioned, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other and with Harry Ducos, James Bellman, Walter Adams, William Kleb, Jr., John Saunders, Nathan W. Hoffman, Burt Erickson, George H. Geiger and Harry Rosen, not named as defendants herein, and with divers other persons to the grand jurors unknown, to defraud the United States and to commit divers offenses against the [fol. 386] United States, to wit, to violate the provisions of the Tariff Act of 1930, and more specifically Title 19 U. S. C, Sections 1593a and 1593b, and the provisions of the Act commonly known as the Anti-Smuggling Act, approved August 5, 1935, in the following manner, that is to say:

It was a part of said conspiracy that the said defendants and others would unlawfully, wilfully and knowingly and with intent to defraud the revenue of the United States, smuggle, and clandestinely introduce into the United States, certain merchandise, to wit, distilled spirits, which said merchandise was then and there subject to duty, without invoicing the same and without paying duty thereon as required by law.

And it was further a part of said conspiracy that LeVeque, Nardone, Nathan Hoffman and divers other per-

sons to the grand jurors unknown, would finance the purchase of alcohol and other spirits in foreign countries and would then facilitate its introduction into the United States, contrary to law.

And it was further a part of said conspiracy that the said Harry Ducos and James Bellman, not defendants herein, would cause to be placed aboard the Br-ish oil crew Isabelle H at St. Pierre, Miquelon, the said alcohol so purchased and would then cause the said Isabelle H to proceed on the high seas in a southerly direction off the coast of the United States.

And it was further a part of said conspiracy that the said defendants Pierre LeVeque, alias Durant, alias Durand, alias George Woodrow, Frank Carmine Nardone alias [fol. 387] Frank Carmine, and Robert Gottfried alias Robert Godfrey, alias Robbie, would procure a small vessel and arrange for the trans-shipment of said alcohol at divers points on the high seas to such small vessels for the purpose and with the intent of introducing the same into the United States, contrary to law.

And it was further a part of said conspiracy that Austin L. Callahan and Hugh Brown, two of the defendants herein, would operate a vessel for the purpose of receiving said alcohol at divers points on the high seas from the large vessel Isabelle H and introduce the same into the United States, contrary to law.

And then follows eight overt acts. The first one says that in pursuance of said conspiracy and to effect the objects thereof, on or about the 17th day of March, 1936, at the Southern District of New York and within the jurisdiction of said Court, Austin L. Callahan, one of the defendants herein, did appear in the vicinity of Pier 5, East River, New York City.

2. For the purpose of effecting the object of the conspiracy, on or about March 17, 1936, within this district, Gottfried did have a conversation with one Conrad Mathiasen.

3. On or about February 10, 1936, in this district, Pierre LeVeque did make a long distance telephone call to Wildwood, New Jersey.

4. On or about February 12, 1936, in this district, Nardone and LeVeque did appear in the vicinity of a restaurant located at 324 West 46th Street, New York City.

5. On or about March 2, 1936, in this district, LeVeque did make a long distance telephone call to Montauk Point, [fol. 388] Long Island, New York.

6. On or about March 17, 1936, in this district, Callahan and Gottfried did have a conversation.

7. That on or about March 17, 1936, Hugh Brown, one of the defendant-, did cause to be docked at the vicinity of Pier 72, North River, a certain vessel known as the Southern Sword.

8. That on or about March 20, 1936, in this district, Gottfried met Pierre LeVeque and Nardone in the vicinity of 324 West 46th Street, New York, N. Y.

As I have said, that is the indictment and those are the three counts in the indictment. That is the legal means by which the case is presented to you for your consideration. No inference is to be drawn from the fact that the defendants were indicted.

The defendants in this case, as in all criminal cases, are presumed to be innocent until proven guilty beyond a reasonable doubt, and that presumption of innocence stays with the defendants from the beginning until the end of the trial and prevails until overcome by evidence which satisfies you beyond a reasonable doubt of their guilt.

Reasonable doubt does not mean beyond all doubt. Reasonable doubt is not a pretext, excuse or device to prevent you gentlemen from performing an unpleasant duty.

During the course of the trial the Court has been called upon to rule upon motions and objections. Those rulings [fol. 389] are matters of procedure only and do not indicate any opinion on the part of the Court as to the guilt or innocence of the defendants. Even if the Court should express an opinion on any phase of the testimony, it would not be in any wise binding upon you. It is the province of the Court to decide questions of law and it is your sole and exclusive duty as jurors to decide questions of fact. In this case that means the guilt or innocence of the defendants.

During the course of the trial there has been some colloquy and statements made by counsel back and forth. Do not pay any attention to that at all. Disregard it entirely. It is your recollection that is to serve you and not that of the counsel or the Court. You heard this evidence. It has

been ably presented and completely presented. So it will not be necessary for me to examine all the evidence. I shall perhaps refer to some of the testimony, not for the purpose of emphasizing it but merely to aid you in arriving at a verdict, because you are to decide this case upon all the evidence and the evidence alone and nothing outside of the evidence. Of course that does not mean that you should not apply your common sense and judgment. You are supposed to draw reasonable inferences from the evidence. That is, if certain facts have been established, then you may infer in a reasonable way. That is proper. That is what the law says.

Certain witnesses are accomplices. If you find any witness is an accomplice, it is your duty to scrutinize the testi- [fol. 390] mony of that witness with care and caution. In this court the defendants may be convicted on the uncorroborated evidence of an accomplice. You are to decide this case, as I have said, upon the evidence and the evidence alone and nothing outside the evidence.

This indictment stripped of its legal verbiage is as follows: The first count charges that these defendants did unlawfully, wilfully and knowingly and with intent to defraud the revenue of the United States, smuggle into the United States approximately 9,600 gallons of alcohol, without paying the duty. There is a duty on alcohol coming into the United States.

The second count of the indictment charges that the defendants on or about March 17, 1936, did unlawfully, wilfully, knowingly and fraudulently receive and conceal and facilitate the transportation and concealment of this merchandise which had been imported and brought into the United States contrary to law.

The first count is that it was smuggled in; the second count is that it came in and was concealed here and that the defendants facilitated the transportation and concealment of this merchandise.

The third count, as I have said, is the conspiracy count. That is, that these defendants and others agreed together and arranged for the smuggling of liquor into the United States for the purpose of defrauding the Government of its duty.

The law is if any person knowingly and wilfully, with intent to defraud the revenue of the United States, smuggles, or clandestinely introduces into the United States any

[fol. 391] merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customs house—that has to do with false invoices or other documents or papers, and has no application here—anybody who aids or assists or helps to bring it in, shall be guilty of a crime.

"If any person fraudulently or knowingly imports or brings into the United States, or assists in so doing, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law shall be guilty of a crime.

"Whenever, on trial for a violation of this section, the defendant is shown to have or to have had possession of such goods, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury."

If two or more persons conspire either to commit an offense against the United States or to defraud the United States in any manner, for any purpose, and one or more of such parties do an act to effect the object of the conspiracy, that is a crime, the crime of conspiracy. In other words, the conspiracy is formed when two or more persons agree unlawfully to violate the Laws of the United States and some act is done in furtherance of the conspiracy.

The elements of a criminal conspiracy are, first, an object to be accomplished; second, a plan or scheme embody-
[fol. 392] ing means to accomplish that object; third, an agreement or understanding between two or more of these defendants whereby they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the scheme or by any effectual means; and, lastly, an overt act by one or more of the defendants, whom you must find parties to the agreement before that overt act can be taken into consideration, to effect the object of the conspiracy. First, the object; second, the plan; third, the concrete agreement; and, lastly, an act to carry out that agreement.

Those are, in substance, the necessary steps. The conspiracy need not necessarily be established by direct evidence; circumstantial evidence may be sufficient. A formal agreement need not be proved. It is sufficient to show that

the parties were acting together understandingly, to accomplish some unlawful act of the parties, even though the individual conspirators may do acts in furtherance of the common, unlawful design apart from and unknown to the others.

In other words, having satisfied yourselves beyond a reasonable doubt the Government has shown a corrupt agreement, then it makes no difference what overt act is done by the parties to the agreement as long as you find beyond a reasonable doubt that an overt act was done to carry out that crime. But it is absolutely of vital importance that you first decide whether there was a corrupt agreement, for the reason that the overt act must be one independently of the conspiracy or agreement. It must not be one of a series of acts constituting the crime, but it must be a subsequent, independent act following the com-
[fol. 393] plete agreement or conspiracy, and done to carry into effect the object of the original agreement.

In this case, as I have said, the Government charges eight overt acts. One act is sufficient. The first thing for you gentlemen to consider is whether there has been an agreement. You are the sole judges of the facts. You have observed this case, what the witnesses said and have been attentive to your duties. The case has been tried well on both sides and summed up ably. So you have the facts before you.

As to the conspiracy, the first question is, has the Government proved and satisfied you beyond a reasonable doubt that two or more defendants are guilty of, first, a corrupt agreement and, second, after the agreement has been made, of an overt act, with the object of a violation of law.

Overt acts may be innocent acts in and of themselves or criminal acts in their very nature. To constitute an offense, not only should the unlawful agreement be proved, but that one of the parties did something to carry out the purpose of the agreement. When such act is done all the parties to the agreement become liable. A mere illegal agreement without an overt act done under it is not a crime, and the conspiracy is not effective until an overt act is committed by one or more of the conspirators. The crime is vitalized by the overt act.

Persons may conspire together to violate the law, but if no overt act is performed in furtherance of the crime, of

course, it is not a crime. If there is an unlawful agreement and one overt act is performed in furtherance of that agreement, then the crime is fixed and is binding, of course, on [fol. 394] all defendants who participated in it and knowingly became parties to the crime or violators of the law. Of course, if they are not parties to the crime, if they are used innocently in the transaction, they are not guilty of any crime.

For example, if there was a conspiracy and as part of that conspiracy it was necessary to send a message by a messenger boy across the street and the messenger boy did not know what it was all about, and if all he did was honestly to deliver a message, of course he would not be guilty of a crime, but only where he is knowingly a party to the offense.

Any statement made by a conspirator during the existence of the conspiracy is binding upon all that were in the conspiracy, even though the others were not present. If it was in furtherance of the conspiracy, any statement made by any defendant, if the conspiracy is at an end, would only be binding upon the particular defendant who made that statement.

A conspiracy is very much like a drama where persons act their parts, where the actors participate, and each one has a part to perform. They do not all necessarily perform the same part. Here the charge is that these defendants and these other people who were mentioned in the indictment conspired to bring into the United States and smuggle liquor into the United States without paying the duty. The law says the duty must be paid. There must be a declaration, if it is imported liquor. These coastwise vessels that ply from one port of the United States to the other do not make a declaration. But if the coastwise vessel is used for the purpose of bringing liquor into the United [fol. 395] States it is their duty to make a declaration and to pay the duty on that liquor. In other words, if they use a boat in coastwise traffic for the purpose of importing liquor, then it would be necessary that that boat, used for that purpose, to make a declaration.

As I have said, the conspiracy is like a drama. The actors have parts to perform, but generally these dramas are behind the scenes, so to speak. These conspiracies are not hatched out in the open. They are done secretly be-

cause invitations are usually not extended to the public officials, the Police Commissioner and the Federal Prosecutor that a conspiracy is going to be formed. They would not know about it, and there would not be any conspiracy. Those things are done very secretively. The idea, of course, is to prevent the officials from knowing that there is to be a violation of the law. That is the point. But it is not always by word of mouth. It is sometimes by the acts and conduct of the parties. Of course, if a man got into a conspiracy honestly, if he were used as a tool without knowledge, of course, he would not be guilty of a crime. If he was not in it originally and became a party to it and knew what they were doing and became a conspirator, the act of one conspirator is binding upon every party to that conspiracy, even though the others are away at the time.

For instance, if there was a conspiracy here in this district to smuggle into the United States liquor, and as part of that conspiracy that defendant should go to Canada and get it off a boat, having knowledge, he went to Canada and got that boat, if he were a party to the conspiracy, every act the conspirators did in furtherance of that conspiracy [fol. 396] would be binding upon him. That is common sense. Of course, if he were not a party, it would not be binding on him.

You have heard the testimony in this case with respect to the liquor. If you find it to be such—I do not think you will have trouble deciding that question—maybe you will. Of course that is up to you gentlemen. Captain Brown testified he believed it was shellac or he said it was shellac. But, gentlemen, do you think it likely that shellac would be delivered out on the waters there from a boat? Would that appeal to your common sense and reason? Don't you think he knew what was going on, or didn't he? That is for you to say. He was captain of the ship. He was in charge of this ship. Here is the cargo, a certain number of gallons, a large cargo delivered to the ship of which he was in command. He says, "I do not know anything about it." Of course, if he did not know it was alcohol, that is the end of it, so far as he is concerned. Or if Mr. Callahan did not know anything about it and he was not a party and did not know the purpose for which this ship was being used—would it seem likely to you that the president of the company or the captain of the ship did or did

not know what the ship was being used for? Of course that is for you to say upon the evidence. You are to decide each issue. You will decide whether or not this is alcohol. You have heard the chemist give the percentage and that it was fit for beverage purposes. Of course, that is to be established to you as part of the proof. If it was smuggled into the United States and these defendants were in it and played any part in it, knowing that it was alcohol, [fol. 397] they are guilty of a crime. If you participate in a conspiracy, if you become a party to it, that is, knowing it is a conspiracy, knowing it is a violation of law, you become a party to it. You are bound by the acts of any conspirator or person whatever performing any role. That is quite reasonable.

There is no mystery about acting as jurymen. Just use your common sense and use your judgment and I think you will have very little difficulty in arriving at a proper verdict in this case. No other judgment is required of you gentlemen than the judgment you exercise in everyday life. Sometimes jurors become confused. They are taken from various walks of life and are required to decide questions of fact. Of course, for a Judge on the bench hearing cases all the time, it is less difficult. You know more about your business than I know about your business, of course, because you are engaged in it. All Judges sitting on the bench and hearing witnesses naturally form an opinion as to what is going on by the exercise of judgment. You exercise your judgment and you draw conclusions in your everyday life. A man may make a business proposition to you. You listen to what he says and you observe him. You come to a conclution about it and say, "Well, I will have nothing to do with that man. I would not believe a word he says." Or he may appeal to you and you say he is telling the truth. In other words, you exercise your judgment. You may enter into a contract with him after looking at the man and observing him and finding out something about his antecedents and you come to a conclusion. That is all you are asked to do. There is no [fol. 398] mystery about exercising your prerogative as jurymen or your judgment as jurymen. Just use your common sense.

Was this alcohol fit for beverage purposes? Was it smuggled into the United States. Were these defendants

a party to it? Of course, if they were not, that is the end of the case, gentlemen. You must take it up separately on each count in the indictment and consider all the evidence. Decide the case fairly and squarely upon the evidence, and the evidence alone.

Something has been said about the season of the year. Gentlemen, you are not concerned with the season. Regardless of your religious attitude, there is something very fine, it seems to me, about Christmas, regardless of one's religious belief. A fine institution. But you are to decide this case upon the evidence and the evidence alone and you are to lay aside, under your oath, all consideration of bias and prejudice or sympathy. It is an important case to the defendants because their liberty may be at stake. It is important to the Government because the Government is trying to break up this practice of smuggling liquor into the United States. These men are not to be convicted for that reason unless they are established guilty beyond a reasonable doubt.

As I said, I shall not refer to the testimony because it has been well presented. You have the right, if you wish, to look at the exhibits. You may send for them. You may examine them. You are to weigh the testimony, examine it and scrutinize it.

You are not in anywise concerned with the consequences of your verdict, be it what it may. All you have to do is to decide the question of the guilt or innocence of the de- [fol. 399] fendants. They were either in this or they were not. They were either in a conspiracy to bring liquor into the United States illegally or they were not. Of course, if these defendants were not a party to it, they are not guilty. If they were in this conspiracy to bring in this liquor then, of course, they would be guilty, if you find it is liquor.

Take this case with an eye single to the performance of your duties as jurymen. Consider all the evidence. Decide the issues upon the evidence and upon the evidence alone. Be fair to the Government. Be fair to the defendants.

Any exceptions?

A Juror: May I say something?

The Court: Yes.

A Juror: Are we to bring in a separate verdict on each count?

The Court: Yes, as to each defendant.

A Juror: As to each defendant.

The Court: There are four defendants on trial. Take them and deal with them separately and then bring in a verdict.

Any exceptions to the charge?

Mr. Nolan: No exceptions. Your Honor has said that if they knew it was liquor they are guilty of a crime. May I ask you to amend that by saying if it was alcohol and came out of the United States?

The Court: Yes, of course. You are to use your common sense as to where it came from.

Mr. Nolan: That is all.

The Court: If it came from the United States or some foreign country, anything to be imported into the United States. I do not think you will have much difficulty in [fol. 400] deciding that. However, it is for you to say. Have I covered everything? Very well. I will excuse the two alternate jurors with the thanks of the Court. I think you had better let the other gentlemen go out and eat some lunch.

The jury retired at 1:05 P. M. in charge of the marshals and afterwards returned to the court room at 4:37 P. M.

VERDICT

The Clerk of the Court: Mr. Foreman, have you agreed upon a verdict?

The Foreman of the Jury: We have.

The Clerk: How say you?

The Foreman: We find all the defendants guilty as charged in the indictment.

Mr. Gallagher: May I ask you to defer sentence until next week? What about the motions?

The Court: Make the motions. I will dispose of the motions.

MOTIONS TO SET ASIDE VERDICT

Mr. Gallagher: So far as Nardone is concerned, I move to set aside the verdict of the jury on the ground it is contrary to law, contrary to the evidence and contrary to the weight of the evidence, and on all the exceptions taken.

The Court: Motion denied.

Mr. Gallagher: Exception.

Mr. Halle: Same motion on behalf of the defendant Gottfried.

Mr. Nolan: Same motion as to the defendants Brown and Callahan.

The Court: Motion denied.

Mr. Nolan: Exception.

Adjourned to December 30, 1936, at 10:30 A. M.

[fol. 401] [Title omitted]

New York, December 30, 1936. 10:30 A. M.

MOTION IN ARREST OF JUDGMENT

Mr. Gallagher: I do not know whether it is your procedure to make a motion in arrest of judgment before sentence.

As far as Nardone is concerned, I move for the arrest of judgment on the ground there have been no facts proven on the trial that warranted the jury in rendering a verdict of guilty against the defendant.

The Court: Motion denied.

Mr. Gallagher: Exception.

SENTENCE

The Court: Callahan, a year and a day as to each count, to run concurrently.

Brown, a year and a day as to each count, to run concurrently.

Gottfried, a year and a day as to each count, to run concurrently.

Nardone, a year and a day on the first count; two years on the second count; two years on the third count; the second and third counts to run concurrently as to each other and to be served after the expiration of the sentence on Count 1. In other words, he is to serve three years.

[fol. 402] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO EXHIBITS AND BILL OF EXCEPTIONS

It Is Hereby Stipulated and Agreed by the undersigned that all the exhibits received in evidence at the trial of this cause shall be deemed a part of the Bill of Exceptions herein, and be omitted from the printed record and

It Is Further Stipulated and Agreed, that upon the argument of the appeal, either party may make use of any of the Exhibits.

It Is Further Stipulated and Agreed, that the foregoing Bill of Exceptions is correct in every particular, that together with the Exhibits Stipulated contains all the evidence in the cause, and that it may be duly signed, settled and allowed as the Bill of Exceptions of the defendants herein by the Honorable Grover M. Moscowitz, United States District Judge.

Dated, New York, N. Y., February 19, 1937.

Lamar Hardy, United States Attorney. Joseph P. Nolan, Louis Halle, Thomas O'Rourke Gallagher, Attorneys for Appellants.

[fol. 402a] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE BILL OF EXCEPTIONS AND RECORD

It is hereby consented stipulated and agreed by and between the United States Attorney and the Attorneys for the appellants that the foregoing record be submitted to the District Judge sitting in Criminal Term to be ordered on

file as the bill of exceptions and the transcript of the record in the above entitled matter.

Dated, New York, N. Y., February 19, 1937.

Lamar Hardy, by L. C. D., United States Attorney.

Joseph P. Nolan, Louis Halle, Thomas O'Rourke Gallagher, Attorneys for Appellants.

So ordered. Alfred C. Coxe, U. S. D. J.

[fol. 403] In United States District Court

[Title omitted]

Order Extending Time for Settling Bill of Exceptions—January 22, 1937

Upon the annexed stipulation, dated January 21st, 1937, and on motion of Thomas O'Rourke Gallagher, attorney for defendant-appellant, Frank C. Nardone, and attorney for defendants on this motion, it is

Ordered that the time for defendants-appellants to file and serve Case on Appeal, Bill of Exceptions and Briefs in the appeal taken herein to the Circuit Court of Appeals, in and for the Second Circuit, be and the same hereby is extended thirty days from the date of this order.

Grover M. Moscowitz, United States District Judge.

[fol. 404] In United States District Court

[Title omitted]

Stipulation Extending Time to File Case on Appeal

It Is Herewith Stipulated and Agreed, that the appellants' time herein, to file and serve Case on Appeal; Bill of Exceptions, Brief, in the appeal taken herein from the Judgment of Conviction and sentence entered December 30th, 1936, be extended thirty days from the date of entry of order.

Dated, New York, N. Y., January 21st, 1937.

Lamar Hardy, by L. Cal., United States Attorney in and for the Southern District of New York.

[fol. 405] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF THOMAS O'ROURKE GALLAGHER IN SUPPORT OF APPLICATION FOR EXTENSION OF TIME TO FILE CASE ON APPEAL

Thomas O'Rourke Gallagher, being duly sworn deposes and says, that he is attorney for Frank Carmine Nardone, one of the above defendants.

This is an application to extend time of defendants to file and serve their Case on Appeal, Bill of Exceptions and Briefs on appeal taken herein heretofore.

The defendants were convicted of conspiracy to smuggle into the United States ninety six hundred gallons of alcohol, smuggling in the same, and possession after it had been smuggled in.

The conviction was had in this District by a jury before United States District Judge Grover Moscowitz, on December 23rd, 1936, and defendants were sentenced and Judgment of Conviction entered December 30th, 1936, at which time the defendant, Nardone, was sentenced to serve one year on the first count, two years on the second count, and [fol. 406] two years on the third count the first and second sentences to run consecutively and the third concurrently. The other three defendants were sentenced to one year and a day.

Notice of Appeal was served and filed and bail fixed for defendants on December 31st, 1936, and defendant Nardone admitted to bail in the sum of $10,000.00, and your deponent believes that the bail fixed in the other three cases was $4,000.00, and the defendants Gottfried and Callaghan were subsequently admitted to bail.

Deponent caused the minutes in this case to be forthwith ordered, and respectfully submits that these minutes are voluminous, as the trial took approximately seven days, and defendant did not receive complete minutes until January 19th, 1937.

In this case there were approximately sixty exhibits offered, which include among other things, transcripts of telephone conversations, totalling approximately 150, and the entire record will be extremely voluminous.

Deponent believes it will be possible to stipulate to offer the original exhibits direct to the Court on the argument of the appeal, instead of printing all of the said exhibits,

but even with this help, there will be a great deal of work entailed in preparing the record for appeal.

Deponent fears that his time to complete this work, and have this case printed, settled and filed, will be too short, as it now stands, and respectfully prays that this court extend his time so to do.

Deponent respectfully submits that he is perfectly satisfied with the consent and approval of the Circuit Court of [fol. 407] Appeals to allow the United States Attorney in and for the Southern District of New York a reasonable time to prepare and file reply briefs in this case, if an extension of time is granted to him on this application.

No previous application has been made for the relief prayed for herein.

Wherefore deponent respectfully prays that an order be granted, extending his time to perfect appeal, and acting on behalf of the other three defendants, at the request of their attorneys, extending their time, and for such other relief as may be just and proper.

Thomas O'Rourke Gallagher.

Sworn to before me this 21st day of January, 1937. Vincent P. Gallagher, Commissioner of Deeds, City of New York, Kings Co. Clerk's No. 26 Register No. 7023. N. Y. Co. Clerk's No. 111 Register No. 41G7. Commission Expires April 20, 1937.

[fol. 408] In United States District Court

[Title omitted]

Stipulation of Substitution

It Is Hereby Agreed and Stipulated, by and between the respective parties, that Thomas O'Rourke Gallagher, Esq., of #188 Montague Street, Brooklyn, New York, be substituted in the place of Louis Halle, Esq., of #152 West 42nd Street, Manhattan, New York City, as attorney for the above named Frank C. Nardone.

Dated, Brooklyn, New York, November 16th, 1936.

Frank C. Nardone, Defendant. Louis Halle, Attorney of Record for Defendant. Thomas O'Rourke Gallagher, Substituted attorney for Defendant.

City of New York,
State of New York,
County of Kings, ss:

On this 16th day of November, 1936, before me personally came and appeared the above named Frank C. Nardone, to me known and known to me to be the individual described in and who executed the foregoing Authorization, and he acknowledged to me that he executed the same.

Vincent P. Gallagher, Notary Public. Commissioner of Deeds, City of New York. Kings Co. Clerk's No. 26 Register No. 7023. N. Y. Co. Clerk's No. 111 Register No. 41G7. Commission Expires April 20, 1937.

[fol. 409] In United States District Court

[Title omitted].

Notice of Motion for Bill of Particulars

Sir:

Please Take Notice, that upon the annexed affidavit of Frank Carmine Nardone, defendant above named, sworn to the 3rd day of December, 1936, the demand hereto annexed, dated December 3rd, 1936, and upon the pleadings and proceedings had herein heretofore, the undersigned will move this Court at a Term thereof for the hearing of Motions, held on the 7th day of December, 1936, at opening of Court on said date, or as soon thereafter as counsel can be heard, for an Order, directing the United States Attorney in and for the Southern District of New York, to furnish defendant, Frank Carmine Nardone, with Bill of Particulars, setting forth specifically and in detail the items demanded herein, and for such other and further relief as to the Court may seem just, proper and equitable.

Dated, Brooklyn, New York, December 3rd, 1936.

Yours, etc., Thomas O'Rourke Gallagher, Attorney for Defendant, Nardone, #188 Montague Street, Brooklyn, New York.

To Lamar Hardy, Esq., United States Attorney in and for Southern District of New York. Clerk of Court.

[fol. 410] IN UNITED STATES DISTRICT COURT

[Title omitted].

AFFIDAVIT OF FRANK CARMINE NARDONE IN SUPPORT OF MOTION

CITY OF NEW YORK,
State of New York,
County of Kings, ss:

Frank Carmine Nardone, being duly sworn, deposes and says: That he is one of the above named defendants.

This is a motion for a Bill of Particulars.

Heretofore, and on or about the 15th day of May, 1936, the Grand Jury, sitting in and for this District, found an Indictment against him and others, charging in substance, a conspiracy to smuggle alcohol into the United States.

The Indictment itself, sets forth an alleged conspiracy to smuggle into the United States, certain quantities of alcohol on or about the 17th day of March, 1936; a further count that this defendant did unlawfully receive and conceal said merchandise, sold and smuggled into the United States on or about the 17th day of March, 1936, and a further count that between the 15th day of October, 1935, and continuing up to the date of the filing of the Indictment, this defendant did, with others, conspire to violate Title 19, U. S. C., Sections 1593a and 1593b.

Said Indictment contains general allegations that on or about the 17th day of March, 1936, this defendant, together [fol. 411] with others named therein, did unlawfully smuggle into the United States, 9600 gallons of alcohol; in the second count, that this defendant, together with others, did unlawfully conceal same; and in the third count, that beginning on or about the 15th day of October, 1935, and continuing up to the date of the filing of the Indictment this defendant and others, did unlawfully conspire and agree to violate provisions of the Tariff Act of 1930, and the Anti-Smuggling Act.

That in furtherance of said conspiracy, this defendant and others, would finance the purchase of same in foreign countries, and facilitate its entry into the United States, and would cause to be placed on board the British Oil Screw "Isabella H," at St. Pierre, Miquelon, the said alcohol, so purchased, and caused the said ship to proceed on the High Seas, in a southerly direction, off the coast of

the United States, and that this defendant and others would procure small contact vessels for the purpose of transshipment of same, which small vessels would unlawfully enter said merchandise into the United States.

Your deponent is in complete ignorance as to just what participation it is alleged he had in said alleged conspiracy, and the many acts it will be claimed constituted same, and in what manner it will be alleged he was connected with same.

Your deponent has consulted with his attorney Thomas O'Rourke Gallagher, with reference to said Indictment, and is informed and verily believes that it would be unfair to compel defendant to proceed to trial on this Indictment, without further particulars, and further that it would be unsafe and practically impossible to proceed to trial, or [fol. 412] prepare a defense to this Indictment, without further particulars, as to the charge set forth in same, and in what manner the Government will allege or attempt to prove his participation in said conspiracy.

Your deponent is making this application in good faith, and for the purpose of enabling him and his counsel to prepare his defense, and any other proceedings deemed necessary to defend himself against this Indictment.

No previous application has been made for the relief prayed for herein, except application for Bill of Particulars, brought by Order to Show Cause, which came on to be heard before Judge Bondy on November 30th, 1936, at which time Judge Bondy suggested that application be made for Bill of Particulars, with reference to the conspiracy charge and counts contained in said Indictment, and stated papers asked for too general relief, as then drawn.

Wherefore, your deponent prays that an order be granted, directing the United States Attorney in and for the Southern District of New York, to furnish defendant herewith, with Bill of Particulars, setting forth specifically and in detail the particulars set forth in attached demand, and for such other and further relief as may be just and proper.

Frank Carmine Nardone.

Sworn to before me this 3rd day of December, 1936. Vincent P. Gallagher, Commissioner of Deeds, City of New York. Kings Co. Clerk's No. 26 Register No. 7023. N. Y. Co. Clerk's No. 111 Register No. 41G7. Commission Expires April 20, 1937.

[fol. 413] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEMAND FOR BILL OF PARTICULARS

The defendant, Frank Carmine Nardone, by his attorney, Thomas O'Rourke Gallagher, herewith demands that you serve upon his said attorney, Bill of Particulars, as to the following:

1. In what manner it will be alleged that this defendant did unlawfully, wilfully and knowingly, and *with intent to* defraud, smuggle into the United States, approximately 9600 gallons of alcohol.

2. If by water, on what boat, giving name of same, the port of debarkation and imbarkation, and more particularly, if at the Port of New York, what pier or other location, on March 17th, 1936.

3. With reference to the above, what act or acts it will be alleged were performed by this defendant, with reference thereto, and in what manner he participated.

4. If smuggled in at one time, so state; if not, in what quantities, at what time and what places.

5. Where it will be alleged that on March 17th, 1936, this [fol. 414] defendant unlawfully, did receive and conceal any part of said merchandise, and more particularly whether or not all of same was received, and if not, how much or what part of same was received by this defendant.

6. What act or acts were committed by this defendant, with reference to the unlawful concealment of same, and if this defendant did not conceal any, in what manner it will be alleged he participated with any of the others, specifically naming the defendants, who assisted in the concealment of same.

7. If same was transported from the point of entry, in what manner same was transported; whether by truck, private automobile, railway car or otherwise.

8. In what manner this defendant, it will be alleged conspired with the others named in the indictment, beginning on or about the 15th day of October, 1935, to violate the provisions of the Tariff Act of 1930, entitled 19 U. S. C.

Section 1593a and 1593b, and the provisions of the anti-smuggling act, specifically setting forth by name, the ones named in the indictment, with whom it will be alleged this defendant did so conspire.

9. What act or acts, it will be alleged were committed by this defendant, in the furtherance of said conspiracy.

10. In what manner it will be alleged this defendant would finance the purchase of alcohol in foreign countries, and facilitate its introduction into the United States, contrary to law.

11. Specifically set forth by name, those named in the indictment with whom it will be alleged this defendant did [fol. 415] so conspire to finance the purchase of said alcohol.

12. If it will be alleged that the defendant paid any moneys or contributed any moneys towards any fund for the purchase of same, specifically set forth the amount it will be alleged this defendant paid or contributed, and to whom same was paid, or contributed, and in what manner, whether by check, cash, postal money order or otherwise. If by check, on what bank said check was drawn; whether or not said check was the check of this defendant, and if not, whose check it was; if by postal money order, the details of same, stating the office sending, the office receiving, and to whom paid, with the date of payment of each item.

13. With reference to the alleged purchase of alcohol in foreign countries, set forth the name and location of the seller.

14. If it will be alleged said alcohol was exported from a foreign country, the date or dates, and quantities; if by ship, name of steamship and vessel and port of said foreign country, from which said vessel sailed.

15. In what manner it will be alleged this defendant would procure a small vessel and arrange for the transhipment of said alcohol at divers places on the High Seas, to such small vessels, for the purpose of introducing same into the United States, contrary to law.

16. What act or acts, it will be alleged, were committed by the defendant, with reference to procuring said small vessels; what vessels were procured; names of same, if

they carry names; registry of same, and time and place [fol. 416] same were procured and what contacts if any were made by said small vessels, at which a transhipment of alcohol was made, and where said contacts were made.

16. Whether or not any such contact was made within the distance that could be covered by the speed of said contact boat, by one hour of sailing from the point of contact, to any port of the United States.

17. What vessel it will be alleged was operated by the defendants, Callahan and Brown, for the purpose of receiving alcohol on the High Seas from the "Isabella H."

18. If said contact was made, and *a transhipment* made, at what particular point, and on what date.

19. Whether or not it will be alleged on the trial that any of said alcohol was entered in the United States, at any other point, besides the Port of New York, and if so the particulars with reference to same, naming the vessel and operators of same, that made the entry, date thereof, and quantity entered.

Dated, Brooklyn, New York, December 3rd, 1936.

Thomas O'Rourke Gallagher, Attorney for Defendant, #188 Montague Street, Borough of Brooklyn, City and State of New York.

To Lamar Hardy, Esq., United States Attorney in and for Southern District of New York.

[fol. 417] IN UNITED STATES DISTRICT COURT

[Title omitted]

PLAINTIFF'S BILL OF PARTICULARS

United States of America, the plaintiff herein, for its Bill of Particulars, by Lamar Hardy, Esq., United States Attorney for the Southern District of New York, pursuant to a decision by Honorable William Bondy, United States District Judge for the Southern District of New York dated December 14, 1936, alleges as follows:

The indictment alleges that the above-named defendants and others smuggled into the Southern District of New

York, 9600 gallons of intoxicating liquor on or about March 17, 1936, and that the above-named defendants and others at the Southern District of New York and at other places conspired to commit offenses against the United States and more specifically to violate the Tariff Act of 1930, Sections 1593(a) and (b) of Title 19, United States Code, and the Anti-Smuggling Act of 1934.

Defendants' demand #4 reads as follows:

"If smuggled in at one time, so state; if not, in what quantities, at what time and what places."

As to the First Two Counts

The said 9600 gallons of intoxicating liquor was smug-
[fol. 418] gled in to the Southern District of New York on March 17, 1936, at Pier 72, North River.

As to the Third Count

The above-named defendants and others conspired to smuggle into the Southern District of New York, 9600 gallons of intoxicating liquor and 4800 gallons of intoxicating liquor into the State of South Carolina.

As to Demand No. 17

The said vessel which the indictment alleges was operated by the defendants Callahan and Brown for the purpose of receiving alcohol on the high seas from the "Isabel H." was the "Southern Sword."

As to Demand No. 18

The contact made between the said "Isabel H." and the said "Southern Sword," was at a point approximately six miles east of Winter Quarter Light Ship, off the coasts of Virginia and Maryland on March 16, 1936.

Dated, New York, N. Y., this 15th day of December, 1936.

Respectfully submitted, Lamar Hardy, United States Attorney for the Southern District of New York, Attorney for Plaintiff, Office and P. O. Address, United States Court House, Foley Square, Borough of Manhattan, City of New York.

To Thomas O'Rourke Gallagher, 188 Montague Street, Brooklyn, New York.

[fol. 419] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL

Names and addresses of appellants:

Frank Carmine Nardone, 121 West 44th St., Bayonne, N.J.

Austin L. Callahan, 93 Washington Street, Nyack, N. Y.

Hugh Brown, 25 South Street, New York City.

Robert Gottfried, % Hotel Breslin, New York City.

Names and address- of appellant's attorneys:

Thomas O'Rourke, Gallagher, attorney for defendant, Nardone, #188 Montague Street, Borough of Brooklyn, City and State of New York.

Louis Halle, attorney for defendant Gottfried, #60 Wall Street, Borough of Manhattan, City and State of New York.

Joseph P. Nolan, attorney for defendants Callahan and Brown, #60 Broad Street, Borough of Manhattan, City and State of New York.

[fol. 420] Offence: Smuggling alcohol into the United States and conspiracy so to do, in violation of Title 17, U. S. C. Sections 1593a and 1593b, and Title 18, Sections 88 and 550.

Date of Judgment—December 30th, 1936.

Brief description of judgment or sentence:

Name of Prison where now confined, if not on bail: United States Government Detention Headquarters, #427 West Street, Manhattan, New York City.

We, the above named appellants, hereby appeal to the United States Circuit Court of *America*, for the Second Circuit, from the judgment above named, on the grounds set forth below:

Dated: New York, N. Y., December 30th, 1936.

Frank C. Nardone, Austin L. Callahan, Hugh Brown, Robert Gottfried.

[fol. 421] IN UNITED STATES DISTRICT COURT

GROUNDS OF APPEAL

First. The District Court erred in admitting as an exhibit in this case, a case of alcohol seized in a case pending in the Eastern District of South Carolina, and an analysis of same.

Second. The District Court erred in admitting into evidence, the contents of a number of telegrams and money orders, in violation of Title 47, U. S. C. A., Section 605, known as the Communications Act of 1934, and Section 151 of the same title (47).

Third. The District Court erred in admitting the contents of a great number of telephone conversations, obtained as a result of tapping wires, in violation of the same Act.

Fourth. The District Court erred in admitting into evidence telephone conversations relating to the arrest of three person- Up-State, at which time one was killed, not in any manner connected with the issue before the Court.

Fifth. The District Court erred in refusing to grant a motion for a mistrial, after said evidence had been admitted.

Sixth. The District Court erred in refusing to grant defendant's motion to dismiss the Second Count of the indictment, which was the possession count, based upon the ground that so far as same affects the appellants, no proof of possession was offered.

Seventh. The District Court erred in refusing to dismiss the First Count of the indictment, to wit, having smuggled into the United States, as far as same affects appellants, on the ground that there was no proof that either of said appellants had smuggled anything into the United States, nor was there proof that any merchandise either [fol. 422] came from a foreign port, or was subject to tax.

Eighth. The District Court erred in refusing to grant the motion to dismiss the Third Count of the indictment, based upon the ground that there was no proof that the appellants had committed any overt act in furtherance of the conspiracy.

Ninth. The District Court erred in refusing to dismiss all Three Counts of the indictment, based upon the ground that there was a fatal variance between the charge and the proof, the indictment charging defendants with having conspired to smuggle into the United States "distilled spirits," and the Bill of Particulars specifically describing same as "intoxicating liquor," and the proof having charged same to be "alcohol."

Tenth. The District Court erred in refusing to strike out all testimony relative to the seizure of the Pronto in the Eastern District of South Carolina, based on the ground that said Act was not within the issues of this trial, and the further ground that the proof offered showed alcohol was seized, whereas the Bill of Particulars alleged intoxicating liquors.

Eleventh. The District Court erred in refusing to dismiss the indictment at the close of the entire case, based upon the ground that a variance fatal and prejudicial to the rights of the appellants existed, when proof was offered showing two separate conspiracies, by the introduction of evidence obtained from the Pronto, whereas the indictment charged one conspiracy.

Twelfth. The District Court erred in permitting witnesses to refresh their memory, with reference to tele-
[fol. 423] phone conversations from records, which witnesses stated were incomplete and in instances, incorrect.

Thirteenth. There was not sufficient evidence to warrant the submission of the case to the jury, of the issues presented in the indictment.

Fourteenth. The District Court erred in denying the defendants' motion to dismiss the indictment, made at the close of the Government's case.

Fifteenth. The District Court erred in denying the defendants' motion to dismiss the indictment, at the close of the entire case.

Sixteenth. The District Court erred in denying defendants' motion for directed verdict of acquittal.

Seventeenth. The District Court erred in denying defendants' motion to set aside verdict of judgment, upon

the rendition of the verdict, and again erred in denying motion renewed before sentence and judgment.

Eighteenth. The District Court erred in denying defendants' motion to arrest the judgment, on the ground that the evidence should not have been admitted, and showed no crime was committed by defendants.

Nineteenth. There was no substantial evidence to support judgment of conviction.

Dated, New York, N. Y., December 30th, 1936.
Louis Halle, Thomas O'Rourke Gallagher, Joseph Nolan, Attorneys for Appellants.

[fol. 424] In United States Circuit Court of Appeals

[Title omitted]

Order Allowing Bail—December 31, 1936

Frank Carmine Nardone, Austin L. Callahan, Hugh Brown and Robert Gottfried, having duly filed and served a Notice of Appeal from the Judgment of Conviction rendered herein, and from the sentence imposed thereon, on the 30th day of December, 1936, and application having been made to this court pending this appeal, and after hearing Thomas O'Rourke Gallagher, Esq., attorney for defendant, Frank Carmine Nardone, and on behalf of the other defendants, in support of same, and Lamar Hardy, Esq., United States Attorney (Mr. Dunigan, of counsel), in opposition,

Now, on motion of Thomas O'Rourke Gallagher, it is

Ordered, that the defendant, Frank Carmine Nardone, be set at liberty upon furnishing a bond for Frank Carmine Nardone, in the sum of Ten Thousand Dollars [fol. 425] ($10,000), during the pendency of said appeal in the said Circuit Court of Appeals for the Second Circuit, and until the mandate of said Circuit Court shall be issued and filed on said appeal, and an order entered thereon; and it is further

Ordered that the defendant, Austin L. Callahan, be set at liberty upon furnishing a bond for Austin L. Callahan,

in the sum of Four Thousand Dollars ($4,000), during the pendency of said appeal in the said Circuit Court of Appeals for the Second Circuit, and until the mandate of said Circuit Court shall be issued and filed on said appeal, and an order entered thereon; and it is further

Ordered that the defendant, Hugh Brown, be set at liberty upon furnishing a bond for Hugh Brown, in the sum of Four Thousand Dollars ($4,000), during the pendency of said appeal in the said Circuit Court of Appeals for the Second Circuit, and until the mandate of said Circuit Court shall be issued and filed on said appeal, and an order entered thereon; and it is further

Ordered that the defendant, Robert Gottfried, be set at liberty upon furnishing a bond for Robert Gottfried, in the sum of Four Thousand Dollars ($4,000), during the pendency of said appeal in the said Circuit Court of Appeals for the Second Circuit, and until the mandate of said Circuit Court shall be issued and filed on said appeal, and an order entered thereon; and

Bail will be vacated on U. S. Attorney's motion, unless this appeal is argued the week of March 1st, 1937.

Martin T. Manton, U. S. Judge.

A true copy. Charles Weiser, Clerk. (Seal.)

[fol. 426] In United States District Court

[Title omitted]

Assignment of Errors

Now comes the defendants in the above entitled action, aver-ing that in the record, proceedings and the final judgment rendered and entered herein, on the 30th day of December, 1936, manifest errors have intervened to the prejudice of the said defendants, and present the following assignment of errors:

First. The District Court erred in admitting as an exhibit in this case, a case of alcohol seized in a proceeding pending in the Eastern District of South Carolina, and an analysis of same.

Second. The District Court erred in admitting into evidence, the contents of a number of telegrams and money

orders, in violation of Title 47, U. S. C. A., Section 605, known as the Communications Act of 1934, and Section 151 of the same Title.

Third. The District Court erred in admitting the contents of a great number of telephone conversations, obtained as a result of tapping wires, in violation of the same Act.

[fol. 427] Fourth. The District Court erred in admitting into evidence telephone conversations relating to the arrest of three persons Up-State, at which time one was killed, not in any manner connected with the issue before the Court.

Fifth. The District Court erred in refusing to grant motion made for mistrial, after said evidence had been admitted.

Sixth. The District Court erred in refusing to grant defendants' motion to dismiss the Second Count of the Indictment, which was the possession count, based upon the ground that so far as same affects the appellants, Nardone and Gottfried, no proof of possession was offered.

Seventh. The District Court erred in refusing to dismiss the First Count of the Indictment, to wit, having smuggled into the United States, as far as same affects appellants, on the ground that there was no proof that either of said appellants had smuggled anything into the United States, nor was there proof that any merchandise either came from a foreign port, or was subject to tax.

Eighth. The District Court erred in refusing to grant the motion to dismiss the Third Count of the Indictment, based upon the ground that there was no proof that the appellants had committed any overt act in furtherance of the conspiracy.

Ninth. The District Court erred in refusing to dismiss all Three Counts of the Indictment, based upon the ground [fol. 428] that there was a fatal variance between the charge and the proof, the indictment charging defendants with having conspired to smuggle into the United States "distilled spirits," the Bill of Particulars specifically describing same as "intoxicating liquor," and the proof having charged same to be "alcohol."

Tenth. The District Court erred in refusing to strike out all testimony relative to the seizure of the Pronto in the Eastern District of South Carolina, based on the ground that said Act was not within the issues of this trial, and the further ground that the proof offered showed alcohol was seized, whereas the Bill of Particulars alleged intoxicating liquors.

Eleventh. The District Court erred in refusing to dismiss the Indictment at the close of the entire case, based upon the ground that a variance fatal and prejudicial to the rights of the appellants existed, when proof was offered showing two separate conspiracies, by the introduction of evidence obtained from the Pronto, whereas the Indictment charged one conspiracy.

Twelfth. The District Court erred in permitting witnesses to refresh their memory, with reference to telephone conversations from records, which witnesses stated were incomplete, and in instances incorrect.

Thirteenth. There was not sufficient evidence to warrant the submission of the case to the jury, of the issues presented in the Indictment.

Fourteenth. The District Court erred in denying the defendants' motion to dismiss the Indictment, made at the close of the Government's case.

[fol. 429] Fifteenth. The District Court erred in denying the defendants' motion to dismiss the Indictment, at the close of the entire case.

Sixteenth. The District Court erred in denying defendants' motion for directed verdict of acquittal.

Seventeenth. The District Court erred in denying defendants' motion to set aside verdict of judgment, upon the rendition of the verdict, and again erred in denying motion renewed before sentence and judgment.

Eighteenth. The District Court erred in denying defendants' motion to arrest the judgment, on the ground that the evidence should not have been admitted, and showed no crime was committed by defendants.

Nineteenth. There was no substantial evidence to support Judgment of Conviction.

Wherefore, the said defendants, by their attorneys, pray that by reason of the above errors, and other errors in the record, proceedings and the final judgment rendered and entered herein, on the 30th day of December, 1936, that the Judgment of Conviction may be reversed, and for naught held, and that the indictment be dismissed, defendants discharged, and for such other and further relief as may be just in the premises.

Louis Halle, Thomas O'Rourke Gallagher, Joseph L. Nolan, Attorneys for Appellants.

[fol. 430] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENTS TO ASSIGNMENT OF ERRORS

Now comes the defendants in the above entitled action, for amended Assignment of Errors, and avers that in the record, proceedings and final judgment rendered and entered herein, on the 30th day of December, 1936, manifest errors have intervened to the prejudice of the said defendants, and present the following Amended Assignment of Errors.

First. The District Court erred in denying the defendants, Nardone and Gottfried's, motion to dismiss the indictment, made at the close of the Government's case.

Second. The District Court erred in denying the defendants, Callahan and Brown's, motion to dismiss the indictment, made at the close of the Government's case.

Third. The District Court erred in denying the defendants, Gottfried and Nardone's, motion to dismiss the indictment at the close of the entire case.

Fourth. The District Court erred in denying defendants, Brown and Callahan's, motion to dismiss indictment, at the close of the entire case.

[fol. 431] Fifth. The District Court erred in admitting into evidence, contents of a number of telegrams and money orders, in violation of Title 47, U. S. C. A., Section 605, known as the Communications Act of 1934, and Section 151

of the same Title, and also in admitting the contents of a great number of telephone conversations, obtained as a result of tapping wires, in violation of the same Act.

Ann Edelman, telephone and telegraph operator of the Western Union Telegraph Company, was called as a witness by the Government.

She testified she was stationed at the Hotel Astor during December, 1935. She was handed Government's Exhibit No. 14, which was a telegraph money order from one Rosen to Ducos, to be used by her to refresh her recollection, so she could testify where it was sent to.

The following took place:

"The Court: Where it was sent to.

"Q. Can you tell now where the money was to be sent?

"A. Yes.

"Q. Where was it sent?

"Mr. Gallagher: I object to her testifying. That is in violation of the Communications Act, Title 47. It was sent through the Western Union Telegraph Company or one of the telegraph companies. That is in violation of the Communications Act, and the disclosure of a message.

"The Court: I will look at the Act. Come up."

(Discussion at bench between Court and counsel.)

[fol. 432] "The Court: You have got it on the record that once a defendant objects no objection need be made by the other defendants. It is not necessary. You are fully covered. There is no question about that."

(Extended discussion on the law. Objection is overruled.)

"Mr. Gallagher: May we have an exception?

"The Court: Yes."

(Further discussion.)

"The Court: As I have said, it will be taken subject to a motion to strike out if not connected. This ruling has nothing to do with this question. I still have that before me.

"Mr. Halle: All this evidence is taken subject to our objection.

"The Court: Yes, subject to a motion to strike out if not connected.

"The Witness (examining Exhibit 14 for identification): The application is in my writing. It went to Halifax, Nova Scotia."

Under this objection, the witness, William E. Dunn, the Government agent, was later shown Government's Exhibit 14 for identification. It was then offered in evidence.

Mr. Gallagher again objected on the same ground, and was overruled, and again objected on the further ground that the exhibit had no connection with anybody connected with the case, and the Court ruled that it was taken subject to a motion to strike out, if not connected.

Mr. Gallagher then objected on the further ground that the exhibit was in the admitted handwriting of the witness, [fol. 433] Miss Edelman, and the Court followed the same ruling, after which Government's Exhibit 14 for identification was received, and marked in evidence.

One Loretta Crowley, an operator of the Western Union, and manager of the branch at the Hotel Astor, was shown Government's Exhibits 21, 22, 23, 28, 30 and 31 for identification, which were money orders, and she testified that same were filled out by her, at the request of either LeVeque or Erickson.

These were offered in evidence, same objection made, and the same ruling made.

Exhibits 10, 18 and 20 for identification, which were also money orders, accepted from Erickson or LeVeque by her, were then offered in evidence, and the same objection and ruling.

Lillian Weiss, chief operator of telephones at the Hotel Astor, called as a witness by the Government, was asked this question, referring to the months of November and December, 1935:

"Do you remember where the calls that LeVeque made went to? Where was the call to go to?"

Objection made to this, as a violation of the Communications Act, which was overruled and exception taken, and the witness was permitted to answer, that the call made by LeVeque was a long distance call that went to Yarmouth, Nova Scotia, and that another call went to Halifax, made by either LeVeque or Erickson.

Later Exhibits 12, 15, 16, 17 and 24, which were money orders, were shown to her for her to recollect whether or

not they were in her handwriting, and upon her replying that they were, they were offered in evidence. The same objection and ruling having been made.

[fol. 434] John Picarelli, an investigator of the Alcohol Tax Unit, was called as a witness by the Government, and testified that he had tapped telephone wires, connected with telephone number Drydock 4-6284, which was in the name of the defendant, Nardone, from January 2nd to April 6th, 1936, and listened to over 504 conversations.

He stated that 700 wire taps had been made, and Mr. Dunigan stated that he had selected 72 out of the 504, which he wanted to have this witness read.

The Court suggested offering in evidence all of the messages.

The witness started to read the first message, when the following took place:

(At this time this exhibit was marked Government's Exhibit No. 66 for identification, and had not as yet been admitted into evidence.)

"Q. I ask you to examine Call No. 3 and tell us about that call?

"Mr. Gallagher: If he is going to divulge the contents of telephone communications, before he answers this question, I want to enter an objection on the ground it is in violation of the Communications Act, Title 47, United States Code.

"The Court: I think this kind of testimony is admissible. It has been so held by the courts.

"Mr. Gallagher: Exception.

"The Court: That is my ruling.

"Mr. Gallagher: May I further have an opportunity to cross-examine this witness, first, on the question of what he knows about that voice, the conversation or the words used at the time which he is now to testify to.

[fol. 435] "The Court: I will let you examine him summarily."

(Mr. Gallagher then proceeded to examine the witness, as to the method, his qualifications, etc., and the examination was stopped by the Court.)

(There was considerable controversy thereafter, with reference to the admissibility of this evidence, and eventually the Court ruled that it was going to admit all of the telephone conversations.)

"The Court: All your objections are overruled. You won't object upon that ground. They may come in on the question of convenience, and I will reserve the objection.

"Mr. Nolan: Exception noted each time?

"The Court: Yes."

Numerous objections were thereafter taken to all of this testimony, with the same rulings and same exceptions.

Joseph A. Kozak was then called as a witness by the Government, and testified that he also was an investigator of the Alcohol Tax Unit, and that since December 20th, 1935, up to January 16th, 1936, he listened into telephone conversations over the wires of Bryant 9-2152, 2156, 2157, 2158, 2159 and 2160, and also to the conversations over the telephone at Belford Restaurant from January 20th, 1936, to March 20th, 1936; he also listened to Longacre 5-7994, that he intercepted several thousand telephone messages at the Hotel Astor, and about 500 at the Belford Restaurant.

When he attempted to testify as to the contents of these [fol. 436] messages, the same objections were made with the same ruling and exception.

All of the telephone messages, telegrams and money orders were objected to, which objections were overruled and exceptions taken.

Sixth: The Court erred in admitting the contents of telephone messages in transcript form, on the further ground that it had been testified to by the operators who listened in, that their notes were not complete or correct in all instances.

The witness, Picarelli, was questioned at great length on this, and the substance of the testimony was that he did not in all instances get a complete record of the telephone conversations.

The following is a sample:

"By the Court: Did you put down everything?

"A. No, sir. Some of the stuff I missed; but everything that is here came over the wire.

"Q. Everything that you heard did you put down?

"A. I missed some words, but everything is on the sheet——

"Q. Did you put down everything that you heard?

"A. No, sir.

"Mr. Gallagher: May I respectfully submit that the witness has testified that everything that is here came over the

wire. May I ask if everything that came over the wire is here?

"The Witness: Except those that I did not get.

"Mr. Gallagher: I respectfully object to his testifying to anything on the ground that there is no proof that the conversation is complete.

"The Court: Overruled. You may answer the question."

[fol. 437] Then the witness detailed a number of conversations which she had listened to.

Subsequently a motion was made to strike out the testimony of this witness, which motion was eventually denied and exception taken.

The witness, Kozak, stated that he was testifying from notes made at the time the messages came over the wire. These notes were taken in shorthand.

This question was asked:

"Do you recall now that you may not have been able to read some of the notes that you took down and wrote down?"

and this answer was given:

"I recall I have had difficulty with some of the notes, yes, sir."

Continuing:

"Q. And then you relied on your memory?

"A. Yes, sir.

"Q. To fill in?

"A. Yes, sir.

"Q. In other words, you did rely on your memory even though those parts which you took down in shorthand which you could not read yourself, you also had to rely on your memory?

"A. Yes, sir.

"Q. Did you fill in a word or a phrase here and there just because it would make better sense, where you could not read a word?

"A. I do not recall. I may have."

Objection then was made to his testimony, on the ground that his notes were not complete, which objection was overruled.

He further testified that he had never met any of the men whom he stated had been talking over the telephone, until [fol. 438] the day of their arrest, to wit, March 20th, 1936.

Picarelli had testified that he had not known the defendant, Nardone, before March 21st, 1936, the day after his arrest, and he saw him for the first time at the United States Commissioner's office.

Kozak further testified as follows:

"Q. Neither did you have any permission from any of these defendants to listen to any of their conversations, did you?

"A. No, sir.

"The Court: I do not think that is admissible. We are not concerned with the question of law. The jury is not concerned, with whether they had permission or not. I had ruled here they had a right to do it. That is all there is to it."

Seventh. The District Court erred in admitting as an exhibit in this case, a case of alcohol seized on the Pronto on January 20th, 1936, in the Eastern District of South Carolina, and an analysis of same, in an endeavor to prove what was alleged to have been smuggled in on the S. S. Southern Sword, on March 17th, 1936, in the Southern District of New York.

The Government alleged that 1600 cases of merchandise — smuggled in to the Southern District of New York, on March 17th, 1936.

The only proof as to the contents was the testimony of Velez, the mate, who stated that Captain Brown had said they were going to pick up some alcohol at sea, and a seaman on board the Southern Sword, who said that the cases were leaking and they smelled like alcohol.

[fol. 439] In an endeavor to prove that it actually was alcohol, the Government brought a case of an altogether different seizure, and offered same in evidence.

The issues were limited to the act alleged to have been committed March 17th on the Southern Sword, at Pier 72, North River, in this District.

"The Court: On or about the 17th of March in this District you possessed, concealed and so on 9600 gallons. * * *"

(Further discussion.)

"The Court: Taken off a boat. That would be on the water. Where was it?

"Mr. Dunigan: Pier 72, North River."

(Further discussion.)

"The Court: Without paying the duty. That is the crime."

(Further discussion.)

"Mr. Gallagher: In open court Mr. Dunigan had stated when I renewed my motion, that he was going to limit his proof as far as the particulars are concerned, to the contact by the Southern Sword with the steamship Isabelle H on the high seas. Where was that?

"Mr. Dunigan: I said in my bill approximately five or six miles off Winter Quarter Lightship. That is off the coast of Virginia and Maryland."

Lieutenant-Commander Ephraim Zoole of the Coast Guard was called as a witness by the Government. [fol. 440] He testified that a ship known as the Pronto was seized seven and one-half miles off the coast of South Carolina prior to this time.

(Another witness set the date at January 20th, 1936.)

Zoole stated that this vessel had about 800 cases of grain alcohol aboard, which was also seized.

This question was asked and answered as follows:

"Q. Look at Government's Exhibit 34 for identification and state whether or not you have seen that case before?

"A. (The witness left the witness stand and then returned) Yes, sir, that case was taken off the Pronto seizure."

Later, Government chemist Joseph V. Sample was called as a witness, to testify as to the alcoholic content of same, which testimony was objected to on the ground that the exhibit was not then in evidence, and at that time was only marked as an exhibit for identification.

Over objection and exception, the witness was permitted to testify.

"Mr. Gallagher: I object to any testimony on his part, unless it's — connection with an exhibit in evidence."

Later on in the trial, the following took place:

"Mr. Dunigan: I offer Government's Exhibits 34—34 and 57 for identification, being the case and bottle respectively.

(This was the case taken from the Pronto and the bottle which the chemist had for analysis.)

[fol. 441] "Mr. Gallagher: That is absolutely incompetent, has nothing to do with this case. Your Honor probably knows the history of Exhibit 34 and the other exhibit. There is no connection with Exhibit 34. It is highly incompetent. We strenuously object to the offer.

"The Court: How is it competent? Come up here. You gentlemen can go outside." (Referring to the jury.)

(Discussion at the bench, between court and counsel.)

"Mr. Gallagher: That is incompetent because the exhibit that is being offered was obtained by the Government 700 miles away from the alleged charge of smuggling in this case, off another boat, which boat was seized outside the territorial waters."

After that there was extended argument with reference to this particular case, and eventually the court made the following statement.

"The Court: * * * This was seized here in the district and then they had to go out to sea and get it, if it was on several vessels, why can't they show that as a part of the whole general scheme? You might have another conspiracy at any particular place, the same as this conspiracy. I overrule the objection.

"Mr. Nolan: * * * (Entering another objection, also stated) There is no evidence connecting this particular case with the cargo that was supposed to be on the Isabelle H.

"The Court: Overruled.

"Mr. Nolan: Exception."

[fol. 442] (There was further extended argument, strenuously opposing the introduction of this evidence, and then the following statement was made.)

"Mr. Gallagher: I assume it is conceded by the Government that 34 came off the Pronto and 67 is an analysis of 34, is that right?

"Mr. Dunigan: There is no question about it."

The Court was in error when it stated that this exhibit was seized in this district, and

"they had to go out to sea and get it if it was on several vessels."

This case never was a part of the cargo of the Southern Sword, and should not have been admitted into evidence.

Eighth. The District Court erred in admitting into evidence, testimony relating to the arrest of three persons Up-State, at which time one was killed, and which was not in any manner connected with the issues before the court, and therefore detrimental to the rights and remedies of these defendants, and injurious to the defendants on trial, and also in refusing to grant a mistrial after this evidence had been admitted.

The agent, Picarelli, was testifying and reading transcripts of telephone messages, intercepted as a result of tapping the wires, in an endeavor to prove a conspiracy, when he read one into evidence which had absolutely nothing to do with this conspiracy.

Testimony, telephone conversations:

"In: We interviewed the fellows up above and they have an indictment against three of them. They were supposed [fol. 443] to surrender, but one of them got killed.

"Out: That's a State indictment, isn't it?

"In: Yes, but they were indicted for impersonating Federal officers, and the wrap is going to be turned over to the Federal Authorities. How much money is needed?"

(This was an alleged conversation between an unknown person, designated as Eddie and the defendant, Frank Nardone.)

As soon as it was offered in evidence, the following took place (discussion at the bench, without the hearing of the jury, as follows):

"Mr. Gallagher: If your Honor please, the United States Attorney had reviewed these statements before he submitted them to his witness to testify about, and it is assumed now that what was in these messages is binding. The witness is now testifying to an occurrence without question absolutely outside the province of this Court, outside of

the indictment, nothing to do with this case; showing Frank Nardone apparently implicated in some manner in a shooting and killing, not in the indictment. A statement such as that is highly prejudicial."

(Then ensued considerable argument with reference to this.)

"The Court: You are objecting now.

"Mr. Gallagher: We respectfully submit that the evidence offered by the United States Attorney on this particular last message which has now been brought to the attention of the jury is so prejudicial that it necessitates a motion for a mistrial."

(Further considerable argument.)

[fol. 444] "Mr. Gallagher: May I submit to the Court that counsel understood that the messages were going to be offered as an exhibit, under an order of Court. Counsel would have an opportunity after the messages were offered to cross-examine on any one of these messages offered, with the aid and assistance of the messages in front of him.

"The Court: Do not misunderstand it. 66 for identification contains how many messages?

"Mr. Dunigan: 504.

"The Court: He selected 72 of them. If you wanted to, you had an opportunity to examine them. You did not examine them. You may now examine them.

"Mr. Gallagher: We did not so understand. We did not understand that. For the purpose of keeping the record straight, I am going to move for a mistrial."

(Further extended argument on the question.)

"The Court: All right, gentlemen, I will instruct the jury to disregard entirely what was said about it. You do not want to read what I am striking out?

"Mr. Gallagher: No, that would only emphasize it.

"The Court: What do you want me to say to them?

"Mr. Gallagher: There is not anything we can do. I feel the damage has been done."

(The Court denied the motion for a mistrial and attempted to correct the error in the following manner.)

[fol. 445] "The Court: February 25th, 1936, is stricken out. Gentlemen, do not consider it in any way at all, and take it out of your mind. That applies to any testimony stricken out during the trial."

Ninth. There was not sufficient evidence to support the judgment of conviction against the defendants, Nardone and Gottfried.

Tenth. There was not sufficient evidence to support the judgment of conviction against the defendants, Callahan and Brown.

Eleventh. The Trial Court committed error in interrogating the witness who pleaded guilty, prior to the time of the trial, during the course of the trial, in an endeavor and attempt to elicit information from him, relative to the case on trial, in endeavoring to strenuously force said defendant to disclose an alleged participation in the conspiracy, by one or more of the defendants.

Pierre LeVeque, indicted as a defendant, plead guilty to the indictment, before the trial started.

Towards the close of the Government's case, the Court excused the jury and called this defendant before him.

Then took place an attempt to elicit information from this defendant, as to the matters then being tried before the court, which covers close to twenty pages of stenographic minutes.

Among other things, the court said the following:

"The Court: If you want any consideration from me I do not say you are going to get it, you had better tell the truth, because when you are in jail for a long time [fol. 446] nobody is going to help you. Do you want to tell the truth to me?"

(Numerous questions and answers.)

"The Court: You tell me the truth and be quick about it. I asked you who was in this with you; give me the names."

(Numerous questions and answers.)

"The Court: You will be a hero and meet a lot of criminals. What are you going to get out of that? Nothing,

because you will be serving many years in jail. Nobody can help you, but yourself. Nobody can protect you but yourself. Now do you want to tell me?''

(Numerous questions and answers.)

''The Court: You want to see your wife and be at home?
''Defendant LeVeque: Certainly.
''The Court: It will be a long time. You better tell me the truth.''

(Numerous questions and answers.)

''The Court: Do not be afraid of criminals. Do not be afraid of criminals.
''Defendant LeVeque: I am not afraid.
''The Court: The Government will protect you against them. Are you afraid of these people here now?''

Eventually the defendant LeVeque charged that defendant Nardone was in this matter with him.

Twelfth. The District Judge who tried the case, was biased and prejudiced.

[fol. 447] In further evidence of the bias of the trial court, in addition to the foregoing, the defendants respectfully submit, that while the telephone messages were being read, the court, attempting to limit the United States Attorney in reading all of them, called United States Attorney's attention to the evidence to be ofgered, by stating:

''The Court: You know what I want here.''

Again during the course of the trial, although this was but a few days before the Christmas holidays, and the defendants had been out on bail, the court cancelled the bail and remanded the defendants to jail.

Thirteenth. The Trial Court erred in admitting into evidence, the papers found in the toilet in the restaurant.

Gordon H. Pike, United States Custom agent, employed by the Treasury Department, called as a witness, stated that he had seen Nardone go in and come out of the toilet of the restaurant, Gottfried go in and come out, and Nardone go in a second time and come out.

He later went in, searched the place and found in two envelopes in the flush box, between fifty to seventy papers in same.

These were marked Government Exhibits 56, 57 and 58 for identification.

He stated that at that time there were four, possibly five agents and the United States Marshal in the restaurant and the Marshal had the warrants of arrest in his pocket.

That the agent- were questioning the defendants while this took place, and that an agent or Marshal went to the toilet with each defendant.

[fol. 448] He also described the toilet as being in this restaurant and having numerous entrances.

"One from the hall to the washroom; one from the restaurant to the hall, and one from the kitchen to the hall."

Also stated that there were employees in the kitchen preparing meals at this time.

In other words that this was a public toilet with at least three entrances, and other people having an opportunity to use same, and conceal therein, any papers.

The Government witness Walter F. Martin stated with reference to Nardone:

"The United States Marshal looked in first, and he stood aside and let Nardone go in behind the little swinging door, and he watched until he came out, and Nardone came back and sat down at his original table."

Exhibit 57 was offered in evidence.

"Mr. Gallagher: I object on the ground already stated. With reference to the other statement, I think it incompetent, irrelevant and immaterial, not binding evidence.

"The Court: Mark it in evidence.

"Mr. Gallagher: Exception."

All of the papers found were offered in evidence. Objection made, overruled, admitted and exception taken.

Fourteenth. The Court erred in refusing to permit counsel for the defendant, Nardone, to state on summation that "good character is a presumption of innocence."

[fol. 449] "Mr. Gallagher: Good character is a presumption of innocence.

"The Court: Not at all. Not in this court. That is the State court rule—that is not our rule."

Fifteenth. The Court erred in failing to correct two misstatements made by the United States Attorney, and to which exception was taken.

After Mr. Dunigan had summed up to the jury, the following took place.

(Discussion at the bench between court and counsel.)

"Mr. Gallagher: I did not wish to interrupt Mr. Dunigan while he was making his summation, but there are two statements that he made to which I wish to take exception. I wish to take exception to the statement made by Mr. Dunigan that 'you saw this alcohol and you smelled it in the court room.' As I have indicated, the exhibit here was obtained from the ship Pronto by Lieutenant-Commander Zoole, of the Coast Guard, who described it as alcohol and said he smelled it here in the court room and said it was obtained from the cargo that was a part of the cargo of the Southern Sword.

"The Court: I do not think that is exactly what he said.

"Mr. Gallagher: I wish to take exception to the statement that he made that Pierre LeVeque has conspired with Nardone.

"The Court: He did not say that. He said he pleaded guilty to the indictment so and so. I will take care of that. [fol. 450] "Mr. Nolan: I take exception to the remarks by Mr. Dunigan as to the degree of guilt of Mr. LeVeque and I move to strike it out from the consideration of the jury.

"The Court: If he said that, that was not improper. That is argument.

"Mr. Nolan: Exception."

Sixteenth. The Trial Court erred in refusing to grant defendants a further bill of particulars.

If the trial was to be limited to proof that the defendants smuggled in 1600 cases or 9600 gallons of alcohol on the Southern Sword at Pier 72, North River, on March 17th, 1936, no further bill of particulars would have been needed, but the Government was permitted to go far afield and bring in evidence of incidents months prior, and also evidence of a seizure on the Pronto January 20th, 1936, off South Carolina.

If the Court knew this was to be permitted, a further bill of particulars should have been granted.

Seventeenth. There is a radical variance between the pleadings and the proof.

Indictment charged smuggling at Port of New York, 9600 gallons of alcohol.

The bill of particulars submitted charged smuggling 9600 gallons of "intoxicating liquors" and 4800 gallons of "intoxicating liquors" at South Carolina.

There was no proof offered of any intoxicating liquors.

Eighteenth. There was a fatal variance between the pleadings and the proof.

[fol. 451] The indictment charged a conspiracy to smuggle in 9600 gallons of alcohol in the Southern District of New York, on March 17th, 1936, and proof was offered of another conspiracy in which some of the defendants were named and some were not named, and other defendants named instead, to smuggle in 800 cases of alcohol in the Eastern District of South Carolina, on January 20th, 1936.

Wherefore the defendants, by their attorneys, pray that by reason of the above errors, and other errors in the record, proceedings and the final judgment rendered and entered herein, on the 30th day of December, 1936, that the judgment of conviction may be reversed, and for naught held, and that the indictment be dismissed, defendants discharged, and for such other and further relief as may be just and proper.

Joseph P. Nolan, Louis Hallé, Thomas O'Rourke Gallagher, Attorneys for Appellants.

[fol. 452] In United States District Court

Stipulation as to Exhibits

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties that all exhibits, a description of which follows, may be omitted from the printed record on appeal and may be passed up to the Court upon the argument of this appeal.

Government Exhibits

No. 1—Photograph—Riedun & Isabella H.—11/11/35.
No. 2—Photograph—Riedun & Isabella H.—11/10/35.
No. 3—Photograph—Riedun and Isabella H.—11/11/35 3:45 P. M.
No. 4—Photograph—Riedun and Isabella H.—and Alpaca 11/11/35.
No. 5—Photograph—Riedun and Isabella H.
No. 6—Telegram—Unsigned to Conrad—12/16/35.
No. 7—Telegram—Durand to Ducas—2/5/36.
No. 10—U. S. Money Order—Freedman to Adams—1/9/36.
No. 11—U. S. Money Order—Murphy to Adams—1/5/36.
No. 12—U. S. Money Order—Rosen to Ducas—12/20/35.
No. 14—U. S. Money Order—Rosen to Ducos—12/19/35.
[fol. 453] No. 15—U. S. Money Order, Rosen to Ducos—12/18/35.
No. 16—U. S. Money Order—Rosen to Adams—12/16/35.
No. 17—U. S. Money Order—Rosen to Adams—12/16/35.
No. 18—U. S. Money Order—Rosen to Ducas—12/5/35.
No. 20—U. S. Money Order, Marchand to Miller—11/14/35.
No. 21—U. S. Money Order, Marchand to Ducas—11/21/35.
No. 22—U. S. Money Order—Halle to Shea—11/4/35.
No. 23—U. S. Money Order—Rosen to Starr—10/26/35.
No. 24—U. S. Money Order—Halle to Starr—10/26/35.
No. 28—U. S. Money Order—Halle to Pike—10/17/35.
No. 30—U. S. Money Order—Rosen to Shea—10/18/35.
No. 31—U. S. Money Order—Bishop to Baker—10/10/35.
No. 34—1 case No. 21593.
No. 35—Postal Telephone & Delivery Sheet.
No. 36—Photo—Isabella H.—Bow.
No. 37—Photo—Van Austrian.
No. 38—Photo—Bayers.
[fol. 454] No. 39—Photo—Conrad.
No. 43—Photo—Ericksen.
No. 44—Photo—Ericksen.
No. 45—Photo—Ericksen.
No. 46—Photo—Geiger.
No. 47—Photo—"Big Red" (Saunders).
No. 48—Photo—"Big Bill" (Klebs).

Govenrment Exhibits—Continued

No. 49—Neufie & Co. Invoice—1/7/36.
No. 50—Atlas-Deisel Invoice—1/8/36.
No. 54—Page 647.
No. 55—Card Marine Air Co.
No. 56—Newspaper Article—3/20/36.
No. 57—Papers with pencil notation.
No. 58—Card with pencil notation.
No. 59—Union Loaders Ticket—Pier 74 N. R. Blank.
No. 60—Western Union Receipt M. O. $1300.00.
No. 61—Paper with list of expenses.
No. 62—Paper with handwriting of Callahan.
No. 63—Paper with handwriting of Callahan.
No. 64—Chart Halifax to Haiti.
No. 65—Chief Officer's Log—S. S. Southern Sword.
No. 66—Record of Phone Conversations.
No. 66A—72 Phone call records.
No. 67—Sample of alcohol from Ex. No. 34.
No. 68—Record of Phone calls—Korzak.

[fol. 455] Defendant Callahan's Exhibits

A—Telegram Shipping Bureau to Callahan.
B—Bill of Sale of S. S. Southern Sword to Italian Society of Navigation.

Dated, February 19, 1937.

Thomas O'Rourke Gallagher, Attorney for Appellants. Lamar Hardy, United States Attorney.

[fol. 456] In United States District Court

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of said District Court in the above-entitled matter as agreed on by the parties.

Dated, February 19, 1937.

Lamar Hardy, United States Attorney. Joseph P. Nolan, Louis Halle, Thomas O'Rourke Gallagher, Attorneys for Appellants.

[fol. 457] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 458] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,

against

FRANK CARMINE NARDONE, Alias Frank Carmine, Austin L. Callahan, Hugh Brown and Robert Gottfried, Alias Robert Godfrey, Alias Robbie, Defendants-Appellants

Before Manton, L. Hand and Chase, Circuit Judges

Appeal from a judgment on a verdict of guilty entered in the District Court for the Southern District of New York. Affirmed.

Lamar Hardy, U. S. Attorney, for Appellee Lester C. Dunigan, Ass't U. S. Atty. Maxwell S. McKnight, Sp. Ass't. Of Counsel.

Thomas O'Rourke Gallagher, Attorney for Defendant-Appellant, Nardone.

Joseph P. Nolan, Attorney for Defendants-Appellants, Callahan and Brown.

Louis Halle, Attorney for Defendant-Appellant, Gottfriend.

CHASE, Circuit Judge:

The appellants were indicted in the Southern District of New York, tried and convicted on all counts, and sentenced. [fol. 459] They have appealed. The indictment was in three counts. The first count charged the violation of 19 U. S. C. A. Sec. 1593 (a), as principals under 18 U. S. C. A. Secs. 550, by smuggling a large quantity of alcohol into the Port of New York; the second count charged the violation of 19 U. S. C. A. Sec. 1593 (a) by receiving and concealing the smuggled alcohol in the Southern District; and the third count charged a conspiracy to violate the above mentioned statutes contrary to 18 U. S. C. A. Sec. 88.

The evidence, much of it circumstantial, was sufficient to justify the jury in finding that in accordance with a preconceived plan agreed to by the defendants either at the beginning or as progress was made, they and others who were not indicted but who will all be referred to as the con-

spirators, caused twenty-four hundred cases of alcohol to be shipped about the 28th day of December 1935 from St. Pierre, Miquelon, on the British oil screw "Isabelle H" to be smuggled into this country without payment of duty. That boat anchored for about two weeks off Yarmouth, N. S. waiting for another boat called the Pronto. For some time before that the Pronto had been undergoing repairs at New London, Conn., at the expense of some of the defendants who sent the funds to pay for them from New York. About the 26th of October 1935, the Pronto sailed from New London for Yarmouth, N. S. where her repairs were completed also at the expense of some of the defendants and partially with parts ordered by them in New York and sent to Yarmouth. About Jan. 12th, 1936, the Isabelle H. picked up the Pronto at Seal Island off Yarmouth and towed her [fol. 460] empty to a point off the coast of South Carolina where eight hundred cases of the alcohol were transferred from the Isabelle H. to the Pronto which was seized and her crew arrested while trying to run past the Coast Guard. Learning of this, the Isabelle H. put into St. George, Bermuda, where she remained for some time under the observation of the U. S. Coast Guard. While there those in charge of her communicated with the conspirators in New York and were sent some funds for expenses. While the Isabelle H. was at St. George the conspirators, Nardone and one Leveque, tried to obtain a boat for use in bringing the sixteen hundred cases of alcohol remaining on the Isabelle H. to New York. They met with others frequently at the Hotel Astor and at the Belford Restaurant in New York where many telephone calls were made and received. Some of these calls enabled defendant Gottfried to talk with Leveque and defendant Callahan and with one Conrad Mathiasen of the Mathiasen Towing Company. On March 15, 1936 the S. S. Southern Sword, owned by the Alco Steamship Company of which defendant Callahan was president, was at Newport News, Va. She had been in command of Captain Pendleton but he had been relieved by Callahan of his command and replaced by defendant Brown when on March 16, 1936 the boat sailed with a cargo of coal for Bridgeport, Conn. That night in clear weather the Southern Sword met the Isabelle H. at sea off Winter Quarter Lightship and took aboard the sixteen hundred cases of alcohol. Captain Brown testified that he supposed the

cases held cans of shellac but there was evidence that he had before stated to a member of the crew that he was to receive alcohol and that he for a moment thought he was [fol. 461] transshipping shellac in fair weather at sea from the Isabelle H., a vessel not in distress, is too preposterous for serious consideration.

The Southern Sword made New York Bay the next night and was met near Governors Island by defendant Callahan who went down to her on a tug of the Mathiasen Towing Company, boarded her and then went back on the tug. Then the Southern Sword went up North River to Pier 72 where she discharged the alcohol surreptitiously and then proceeded with her cargo of coal to Bridgeport, Conn., where her regular captain, Pendleton, resumed command. In this way the sixteen hundred cases, containing 9,600 gallons of alcohol, were smuggled into New York.

On March 20, 1936 the Southern Sword was seized at Bridgeport and the defendants were arrested, some of them at the Bedford Restaurant where Gottfried tried to get rid of some papers having to do with the business. That all the defendants were parties to the unlawful agreement and that all of them actively assisted within the Southern District of New York in carrying it out was shown too plainly, though in part circumstantially, despite such denials as appear in the record to make it profitable to attempt any further analysis of the evidence. The claimed errors in the trial alone supply all reasonable basis for seeking reversal.

Of these all are merely frivolous except those which relate to the introduction into evidence of information obtained by wire tapping. It appeared that for some time before the defendants were arrested they had been under the observation of Federal agents and that about five hundred of their telephone calls had been made while government agents were [fol. 462] listening in and taking notes in so far as possible of what was said. Of these the prosecuting attorney selected 72 messages for introduction into evidence. They had a vital part in the government's proof and if they were erroneously admitted reversal must follow without question.

Before discussing the main objection to them, notice should be taken of one between defendant Nardone and an otherwise unidentified person called Eddie. It had to do with "the fellows up above" of whom three had been indicted in the state court. They were "supposed to surrender

but one of them got killed". The suggestion was made "that the rap is going to be turned over to the Federal authorities" and Nardone told Eddie to leave the amount of money needed to their discretion. This was objected to as soon as read as having no connection with the case and because prejudicial to Nardone a motion was made for a mistrial. That was denied but as the government attorney could not show the connection of the message, the court with his consent decided to strike out the evidence. Defendant Nardone's attorney expressed doubt as to the effectiveness of that and insisting that the error could not be cured declined the offer of the court to read just what was being struck out and stood upon his motion for a mistrial. Thereupon the court said to the jury; "February 25th, 1936, is stricken out. Gentlemen, do not consider it in any way at all, but take it out of your mind. That applies to any testimony stricken out during the trial". If incurable error was committed in reading this message to the jury, it is obvious that no harm [fol. 463] was done any defendant but Nardone. The harm, if any, to him consisted in the showing of his interest in and willingness to help some unknown persons who had been indicted in a state court. The vice lay mainly in the guarded language used, for a willingness to assist one accused of crime is not in itself reprehensible. The general atmosphere of wrong doing hurt here if anything about the message did. Then, too, it is impossible to excuse the reading of a message which by its terms referred only to the claimed infraction of some state law having apparently nothing to do with the subject matter of the indictment on trial. But after all, the harm, if any, was so general and vague that we are not prepared to say that it was not cured by the prompt action of the court. Besides that, any doubt about it should be laid aside in view of the fact that the charges against Nardone in the indictment in this case were by competent evidence so clearly shown that a reversal on this point would be a plain miscarriage of justice. Under such circumstances, 28 U. S. C. A. Sec. 391 is to be given effect. Tingley v. United States, 34 Fed. (2) 1.

A more serious matter relating to the introduction of all the messages and which is applicable to all the appellants concerns their admissibility in view of 47 U. S. C. A. Sec. 605 which is a part of the Federal Communications Commission Act of June 19, 1934 and was a part of the Radio Act of

1927. That section forbids the unauthorized publication of communications by any person "receiving or assisting in receiving or transmitting or assisting in transmitting any interstate or foreign communications by wire or radio" and [fol. 464] thus far cannot apply to this case as the government agents who listened in were not assisting in the receipt or transmission of any messages. But the section also provides, with exceptions not here relevant, that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person." We take it for granted that this refers only to interstate and foreign messages. There were enough of them introduced in evidence so that we need not now be concerned with any distinction between what were purely intrastate messages and what were not. That aside, decision turns upon whether, assuming that the interception of the mesages was unlawful, their introduction in evidence was error. The Supreme Court in Olmstead v. United States, 277 U. S. 438, decided June 4, 1928, considered the admissibility of evidence in a Federal court obtained by a government officer by tapping a wire in violation of a criminal statute of the state of Washington and held it admissible suggesting that, "Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence. But the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment".

The above mentioned statute subsequently passed by Congress is silent as to the admissibility of messages intercepted contrary to its provisions. As Congress did not see fit to adopt the suggestion of direct legislation to make such [fol. 465] evidence inadmissible, we are, of course, bound to enforce the law as declared in the above case. That would dispose of the point flatly were it a state rather than a federal law which forbade the interception of these messages. Yet in principle there is no distinction. Since there is no constitutional prohibition of their admission in evidence, it is necessary to their exclusion that some statute must so provide. Evidently Congress did not care for such a policy. As Chief Justice Taft said: "A standard which

would forbid the reception of evidence if obtained by other than nice ethical conduct by government officials would make society suffer and give criminals greater immunity than has been known heretofore." Olmstead v. United States, supra.

Nor were they inadmissible because the agents were unable to testify that they took down verbatim all that was said. Olmstead v. United States, 19 Fed. (2) 842; Schoborg v. United States, 264 Fed. 1.

Judgment affirmed.

[fol. 465½] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States of America v. Frank Nardone et als. (Copy.) Opinion. Chase, Circuit Judge.

[fol. 466] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 21st day of June, one thousand nine hundred and thirty-seven.

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon. Harrie B. Chase, Circuit Judges.

UNITED STATES, Plaintiff-Appellee,

vs.

FRANK CARMINE NARDONE ET AL., Defendants-Appellants

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 467] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States v. Frank Carmine Nardone et al. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 21, 1937. William Parkin, Clerk.

[fol. 468] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 467, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of United States, Plaintiff-Appellee, against Frank Carmine Nardone, et al., Defendants-Appellants, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this twenty-ninth day of June, in the year of our Lord one thousand nine hundred and thirty-seven, and of the Independence of the said United States the one hundred and sixty-first.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 469] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

Endorsed on cover: File No. 41,671. U. S. Circuit Court of Appeals, Second Circuit. Term No. 190. Frank Carmine Nardone, Austin L. Callahan, Hugh Brown and Robert Gottfried, petitioners, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed July 3, 1937. Term No. 190, O. T., 1937.

[fol. 334] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 190

THE UNITED STATES OF AMERICA, Appellee,

against

FRANK CARMINE NARDONE, AUSTIN L. CALLAHAN, HUGH BROWN and ROBERT GOTTFRIED, Defendants-Appellants

A motion having been made before me, as one of the Associate Justices of this Court, at #258 Sound View Avenue, in the City of White Plains, County of Westchester, State of New York, on the 24th day of June, 1937, for an order staying the Mandate of the United States Circuit Court of Appeals, in and for the Second Circuit, and the execution thereof, insofar as it affects the defendants above named, until final determination of a petition for a Writ of Certiorari, to be filed by said defendants, and in the mean time and until such final determination that the bail given by the defendants herein be continued; After reading and filing the Notice of Motion dated June 22nd, 1937, and the affidavit of Thomas O'Rourke Gallagher, attorney for the defendant, Frank Carmine Nardone, duly verified the 22nd day of June, 1937, in support of said motion, and after hearing Louis Halle, attorney for the defendant Gottfried, Joseph P. Nolan, attorney for the defendants Callahan and Brown, and Thomas O'Rourke Gallagher, attorney for the defendant Nardone, in support of said motion, and Lamar Hardy, Esq., United States Attorney in and for the Southern District of New York, (Mr. Francis A. Mahony, Assistant United States Attorney, and Mr. Maxwell S. McKnight, Special Assistant to the United States Attorney, of counsel), in opposition thereto, and an opin-
[fol. 335] ion having been rendered upon said application, as follows:

"Application for Stay of Mandate

"The present Statute (Act of June 19, 1934, C. 652, §605, 48 Stat. 1103; 47 U. S. C. §605) makes it unlawful for any one, unless authorized by the sender, to intercept a wire or radio message. It does not stop there. It says that the

message, if intercepted, shall not be divulged or published. I think the question should be considered by the court whether this is not a prohibition against divulging the message anywhere, even on the witness stand, and hence a prohibition against receiving it in evidence. No such statute was before the court in Olmstead v. United States, 277 U. S. 438. The tenor of the Washington Act considered in that case was altogether different.

"The application will therefore be granted, conditioned upon the filing of a petition for certiorari within the time fixed by the Rules.

"Settle order upon notice, reciting the foregoing memorandum.

"Dated June 26, 1937.

"Benjamin N. Cardozo, Associate Justice of the Supreme Court of the United States."

Now on motion of the attorneys for the defendants, it is

Ordered that the Mandate of the United States Circuit Court of Appeals, in and for the Second Judicial Circuit, and the execution of the judgment of said court and of the United States District Court in and for the Southern District of New York, in the above entitled cause, be and the same are hereby stayed, conditioned upon the filing of [fol. 336] a petition herein for a Writ of Certiorari, within the time fixed by the rules of this court, the stay to continue, if the petition is so filed, until the petition has been granted or denied, and in the event that it is granted until the cause has been determined; and it is further

Ordered that the bail heretofore given herein by the above named defendants, be and the same hereby is continued, in accordance with the foregoing.

Dated White Plains, New York, July 3, 1937.

Benjamin N. Cardozo, Associate Justice of the Supreme Court of the United States.

[fol. 337] I approve of the form of the within Order.

Dated New York, N. Y., July 2nd, 1937.

Lamar Hardy, United States Attorney in and for the Southern District of New York.

FILE COPY

FILED
JUL 3 1937
CHARLES ELMORE CR
CLE

Supreme Court of the United States

OCTOBER TERM 1937

No. 190

FRANK CARMINE NARDONE, AUSTIN L. CALLAHAN, HUGH BROWN and ROBERT GOTTFRIED,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

THOMAS O'ROURKE GALLAGHER,
LOUIS HALLE,
JOSEPH P. NOLAN,
Attorneys for Petitioners.

Supreme Court of the United States

OCTOBER TERM 1937

No. .....

FRANK CARMINE NARDONE, AUSTIN L. CALLAHAN, HUGH BROWN and ROBERT GOTTFRIED,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Frank Carmine Nardone, Austin L. Callahan, Hugh Brown and Robert Gottfried, pray that a writ of certiorari issue to review the Judgment of the United States Circuit Court of Appeals for the Second Circuit, on which decision was rendered on the 14th day of June, 1937, affirming the judgment of the United States District Court, for the Southern District of New York, at the Borough of Manhattan, City and State of New York, convicting the defendants of a violation of Title 19, United States Code, Section 1593A and B, and Title 18, United States Code, Sections 88 and 150.

Statement of the Matter Involved

The defendants were charged with smuggling into the Port of New York 1,800 cases of alcohol, on March 17th, 1936, in violation of Title 19, United States Code, Section 1593A on the first count of an indictment; with having possessed and concealed same thereafter, in violation of Title 19, United States Code, Section 1593B on the second count, and with having conspired together and with others to do these acts, in violation of Title 18, United States Code, Section 88, on the third count.

The alleged conspiracy as charged in the indictment, covered a period of time from the 15th day of October, 1935, to the date of the filing of the indictment, to wit, May 15th, 1936.

The Government, in order to prove its case, by its agents, testified that over this period of time Federal agents had the defendants under observation, and had tapped numerous telephone wires, and had listened in to over five hundred telephone calls between the various parties and others.

Of these, the prosecuting attorney selected 72 messages for introduction into evidence, and over strenuous objection, timely made and persisted in throughout the trial, Federal agents were permitted to testify to the contents of said telephone messages.

The Circuit Court of Appeals in its decision in this case, specifically stated with reference to these messages:

> "They had a vital part in the government's proof and if they were erroneously admitted reversal must follow without question" (Opinion in the Record).

The decision then deviated, to pass upon a specific message and continuing on the main theme with reference to these messages, further stated:

> "A more serious matter relating to the introduction of all the messages and which is applicable to all the appellants concerns their admissibility in view of 47

U. S. C. A., Sec. 605 which is a part of the Federal Communications Commission Act of June 19, 1934 and was a part of the Radio Act of 1927" (Opinion in the Record).

The Circuit Court also conceded in its decision that said section "refers only to interstate and foreign messages. There were enough of them introduced in evidence so that we need not now be concerned with any distinction between what were purely intrastate messages and what were not. That aside, decision turns upon whether, assuming that the interception of the messages was unlawful, their introduction in evidence was error" (Opinion in the Record).

Your petitioners respectfully submit this is in direct conflict with the decision in the case of *Hearst* against *Black*, decided by the United States Court of Appeals for the District of Columbia, Case No. 6808, Nov. 7th, 1936.

Your petitioners respectfully submit that numerous other serious errors had been committed by the trial court which the Circuit Court of Appeals refused to consider, but which your petitioners feel this court should pass upon.

Question Involved

Assuming that the interception of telephone messages was unlawful, was their introduction into evidence error?

The Circuit Court in its opinion stated that if this is a fact "reversal must follow without question".

Statute Involved

Title 47, U. S. C. A., Section 605, provides in part as follows:

> "No person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person."

Reasons for Allowance of Writ

It is respectfully submitted that Title 47, U. S. C. A., Section 605, and its interpretation involves "an important question of federal law which has not been, but should be, settled by this court" (Rules Supreme Court of the United States, Rule 39—paragraph 5—Sub-division b).

The Circuit Court of Appeals relied upon the decision in the case of Olmstead v. United States, 277 U. S. 438, decided June 4th, 1928.

This was a decision by a divided court (5 to 4) and was decided prior to the enactment of Title 47, U. S. C. A., Section 605, which was enacted June 19th, 1934.

WHEREFORE your petitioners respectfully pray that this petition for Writ of Certiorari to review the judgment of the Circuit Court of Appeals herein be granted.

New York, N. Y., July 12, 1937.

FRANK CARMINE NARDONE,
AUSTIN L. CALLAHAN,
HUGH BROWN,
ROBERT GOTTFRIED,

By: THOMAS O'ROURKE GALLAGHER,
JOSEPH R. NOLAN,
LOUIS HALLE,
Counsel for Petitioners.

Supreme Court of the United States

OCTOBER TERM 1937

FRANK CARMINE NARDONE, AUSTIN L. CALLAHAN, HUGH BROWN and ROBERT GOTTFRIED,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION

The opinion rendered by the United States Circuit Court of Appeals, Second Circuit, will be found annexed to the transcript of the record.

No opinion was rendered by the United States District Court, for the Southern District of New York.

Jurisdiction

The statutory provision under which the jurisdiction of this court is invoked is Section 240 (a) of the Judicial Code, as amended by Act of February 13th, 1925, and the Act of March 8th, 1934.

Statement of the Case

Statement of the case is set forth in the petition.

Specifications of Errors to be Urged

It is respectfully submitted that the Circuit Court of Appeals misinterpreted the explicit provisions of Title 47, U. S. C. A., Section 605, which is a part of the Federal Communications Act of June 19th, 1934, in approving of

the introduction into evidence of the contents of 72 telephone messages, many of which were interstate, unlawfully intercepted by government agents, in an attempt to obtain evidence against these defendants.

ARGUMENT

POINT I

Title 47 U. S. C. A. Section 605, prohibits the use of such evidence so obtained.

This statute specifically states that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person."

The defendants were charged with conspiring between themselves and others, to smuggle into the United States 1,800 cases of alcohol at the Port of New York.

The conspiracy it is charged extended over a considerable length of time.

> "It appeared that for some time before the defendants were arrested they had been under the observation of Federal agents and that about five hundred of their telephone calls had been made while Government agents were listening in and taking notes in so far as possible of what was said. Of these the prosecuting attorney selected 72 messages for introduction into evidence. They had a vital part in the Government's proof and if they were erroneously admitted reversal must follow without question." (Opinion of the Circuit Court of Appeals in this case.)

This Federal statute referred to herein specifically stated that *no person*, not being authorized by the sender should intercept any communication and divulge or publish the contents, etc., to *any person*.

This statute means just what it says. It applies to everyone. The words used when it refers to intercepting a message are the words "no person" and when it refers to the prohibition against divulging and publishing the contents are "any person."

Had Congress wished or desired to make an exception in the prosecution of criminal cases, it would have been a simple matter for Congress to so state in writing the law.

Congress did not see fit and Congress did not make any exception.

The statute itself is explicit.

Congress even went further than this and it not alone prohibited the interception and publication of communications, but also made it a criminal offense to do so. Title 47, U. S. C., Sec. 501, specifically prescribes that a violation shall be punishable by a fine of not more than $10,000.00 or by imprisonment for a term of not more than two years or both.

POINT II

The decision in the Olmstead case is not controlling.

The Circuit Court of Appeals relied upon the decision in the case of *Olmstead against United States*, 277 U. S. 438, decided June 4th, 1928, which considered the admissibility of evidence obtained by Government officer tapping a wire in violation of a criminal statute of the State of Washington, and held same admissible.

The court's decision was based upon the fact that there was no Federal statute at that time prohibiting same.

Subsequent to this decision and on June 19th, 1934, the Federal Communications Commission Act (which included Title 47, U. S. C. A., Section 605) became part of the law of the land.

In the Olmstead case, a government officer tapped a wire in violation of a state statute. In the case on appeal, government agents admitted tapping wires and listening to

communications without the consent of the "senders" in violation of this federal statute.

Congress in enacting Title 47, U. S. C. A., Section 605, used clear and unmistakable language. It expressly forbade *any person* from intercepting any communication and divulging or publishing the contents *to any person*.

This is an all embracing statute; there is no limitation or exception made in the law.

POINT III

Conclusions

For the reasons stated in the petition and in this brief it is respectfully submitted that the application for writ of certiorari should be granted.

Respectfully submitted,

THOMAS O'ROURKE GALLAGHER,
LOUIS HALLE,
JOSEPH P. NOLAN,
Attorneys for Petitioners.

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No. 190

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

FRANK CARMINE NARDONE, AUSTIN L. CALLAHAN, HUGH BROWN and ROBERT GOTTFRIED,

Defendants-Appellants,

against

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF OF DEFENDANT-APPELLANT FRANK CARMINE NARDONE

THOMAS O'ROURKE GALLAGHER,
Attorney for Defendant-Appellant,
Frank Carmine Nardone.

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Argued by
MR. THOMAS O'ROURKE GALLAGHER

Supreme Court of the United States

FRANK CARMINE NARDONE, AUSTIN L. CALLAHAN, HUGH BROWN and ROBERT GOTTFRIED,

Defendants-Appellants,

against

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF OF DEFENDANT-APPELLANT FRANK CARMINE NARDONE

The opinion rendered by the United States Circuit Court of Appeals, Second Circuit, will be found annexed to the transcript of the record (R. 327). It is reported in 90 Fed. (2d) 630.

No opinion was rendered by the United States District Court, for the Southern District of New York.

Jurisdiction

The statutory provisions under which the jurisdiction of this Court is invoked, is Section 240 (A) of the Judicial Code, as amended by the Act of February 13th, 1925, and the Act of March 8th, 1934.

Writ of Certiorari was granted in this case, October 11th, 1937.

Statement of Case

The defendants were convicted of smuggling into the Port of New York, 1,800 cases of alcohol, on March 17th, 1936, in violation of Title 19, United States Code, Section 1593A on the first count of an indictment; with having possessed and concealed same thereafter, in violation of Title 19, United States Code, Section 1593B, on the second count, and with having conspired together and with others to do these acts, in violation of Title 18, United States Code, Section 88, on the third count.

The alleged conspiracy as charged in the indictment, covered a period of time from the 15th day of October, 1935, to the date of the filing of the indictment, to wit, May 15th, 1936.

The Government, in order to prove its case, by its agents, testified that over this period of time Federal agents had the defendants under observation, and had tapped numerous telephone wires, and had listened in to over five hundred telephone calls between the various parties, and others.

Of these, the prosecuting attorney selected 72 messages for introduction into evidence, and over strenuous objection, timely made and persisted in throughout the trial, Federal agents were permitted to testify to the contents of said telephone messages.

It was conceded by the Circuit Court, that many of these messages were interstate in character (90 Fed. [2d] 630 at p. 632, R. 331).

A further point is urged by the defendant-appellant, Nardone, as same concerns him alone, to wit, that a certain telephone message, intercepted as were the others, alleged to have been between him and an unknown person called "Eddie", having absolutely nothing to do with this case, and being solely with reference to some State law violation by others, was introduced into evidence over objection, and motion for a mis-trial denied (R. 160).

It is further respectfully urged that this Court review all of the evidence, as defendant-appellant, Nardone, claims that there was absolutely no evidence offered showing any overt act or participation on his part in any conspiracy, or other crime.

Statement of Assigned Errors Presented to This Court

It was error for the trial court to permit the introduction into evidence of the contents of intercepted telephone messages, obtained by Federal agents tapping the wires, in violation of Title 47, U. S. C. A., Section 605 (R. 58, 131 and 139). It was error to receive in evidence, copies of telegrams and telegraph money orders, obtained in violation of this same statute (R. 57, 61 and 64).

It was error for the trial court to permit testimony of a conversation over the telephone (obtained by tapping the wires as aforesaid), between the defendant-appellant Nardone, and some other unknown person, the contents of which had absolutely no reference to the case on trial or connection with same, and which conversation was prejudicial to this defendant-appellant, on the trial (R. 160).

It was error for the trial court to refuse to grant the motion of defendant-appellant Nardone, to dismiss at the close of the case (R. 244, 246 and 275).

ARGUMENT

I

Title 47, U. S. C. A., Section 605, prohibits the interception and/or the divulging or publication of the contents of any such intercepted communication.

The most concise statement supporting this point, is contained in the memorandum written by Associate Justice BENJAMIN N. CARDOZO, in granting the application for a stay, pending this appeal, on June 26th, 1937.

Judge CARDOZO said:

> "The present Statute (Act of June 19, 1934, C. 652, §605, 48 Stat. 1103; 47 U. S. C. A., §605) makes it unlawful for anyone unless authorized by the sender, to intercept a wire or radio message. It does not stop there. It says that the message, if intercepted, shall not be divulged or published. I think the question should be considered by the court whether this is not a prohibition against divulging the message anywhere, even on the witness stand, and hence a prohibition against receiving it in evidence. No such statute was before the court in Olmstead v. United States, 277 U. S. 438. The tenor of the Washington Act considered in that case was altogether different." (Not in printed record; filed with Clerk of this court.)

After submitting this opinion to the court, appellant feels there is very little that he can add, and hesitates in going further.

With due deference to Judge CARDOZO, and not with any intention of adding to this opinion, but simply to elaborate on same, appellant respectfully submits:

The Olmstead (*supra*) appeal, was based on a violation of the 4th and 5th Amendments of the Constitution, and was rendered June 4, 1928, six years prior to the Federal Communications Act of June 19, 1934.

In the Olmstead case, a government officer tapped a wire in violation of a state statute. In the case on appeal, government agents admitted tapping wires and listening to communications, without the consent of the "senders", in violation of this federal statute.

Congress in enacting Title 47, U. S. C. A., Section 604, used clear and unmistakable language. It expressly forbade *any person* from intercepting *any* communication and divulging or publishing the contents to *any person.*

This is an all embracing statute; there is no limitation or exception made in the law.

Had Congress desired to make an exception in the prosecution of criminal cases, it would have been a simple matter for Congress to so state, in writing the law.

Congress did not see fit, and Congress did not make any exception.

The statute itself is explicit.

Congress even went further than this, and it not alone prohibited the interception and publication of communications, but also made it a criminal offense to do so.

Title 47, U. S. C. A., Section 501, specifically prescribes that a violation shall be punishable by a fine of not more than $10,000.00, or by imprisonment for a term of not more than two years, or both.

Excerpts from the Opinion of the Circuit Court

> "It appeared that for some time before the defendants were arrested they had been under the observation of Federal agents and that about five hundred of their telephone calls had been made while Government agents were listening in and taking notes in so far as possible of what was said. Of these the prosecuting attorney selected 72 messages for introduction into evidence. They had a vital part in the Government's proof and if they were erroneously admitted reversal must follow without question" (R. 329).

History of the Act

Comparatively from the time the Federal Post Office started to function, private correspondence was considered sacred.

As the years went by and the telegraph and telephone were invented, neither of these being operated by the Government, but by private companies, legislation was enacted in the various states, and in a number of states, laws were passed, making it a crime to tap telephone wires.

In the editor's notes in the Olmstead (*supra*) case, a list of statutes is compiled, showing that laws had been passed, making it a criminal offense to intercept a message or divulge the contents of same in a total of 39 states of the Union (72 Law Ed. p. 957).

Very properly, Chief Justice TAFT, in the Olmstead (*supra*) case, decided that no State could, by its legislation, limit or prescribe the rules of evidence applicable in Courts of the United States.

Later, radio was invented, and it being interstate, without question, in its scope, a Federal commission was created to supervise.

This Commission had absolutely *nothing to do with telephone or telegraph* companies.

Section 4 of the Act of August 13th, 1912 (c. 287; 37 Stat. 304), prohibited any person from divulging or publishing the contents of any message, transmitted or received by radio station, except "to a person or persons to whom the same may be directed or their authorized agent or another station * * * unless legally required so to do by the court of competent jurisdiction or other competent *authority*", *and also provided* a penalty for a violation of this section.

Zoline's Federal Criminal Law and Procedure, Volume 2, page 482, Section 1199.

The Act of October 29th, 1918, C. 197, 40 Stat. at L. 1017, made the same provision during governmental operation of the telephone.

The Radio Act of February 23rd, 1927, Chapter 169, Sec. 27, 44 Stat. at L. 1162, 1172, U. S. C. Appx., Title 47, Secs. 63-39 (*Mason's*) contained the same provision, relative to radio messages, with no exception.

Subsequent thereto, and *after* the Olmstead (*supra*) decision, the Federal Communications Commission Act came into existence, and the Federal Radio Commission was merged into same (June 19, 1934).

Prior to the enactment of this act, the prohibition was against the unauthorized publication of *radio* communications (except in 1918 during the governmental operation of the telephone as a war time measure), and by this Act, the prohibition was extended to the telephone and telegraph.

In submitting its report on the bill, the Senate Committee on Interstate Commerce said:

> "Section 605 prohibiting unauthorized publication of communications, is based upon Section 27 of the Radio Act and extends it to wire communications. S. Rep. No. 781, 73d Cong. 2d Sess. p. 11, Con. Doc. 9770."

The Beard Case Is Not Controlling

In the case of *Beard* v. *U. S.*, 82 Fed. (2d) 837 (App. D. C.), Associate Justice GRONER, writing the opinion, stated the evidence was offered solely to prove that the place was a gambling place.

Reviewing the question, he said:

> "The case therefore is not one in which evidence of a telephone conversation is introduced against a particular person."

The Smith Case

In the case of *Albert H. Smith et al.* v. *United States*, decided by the same court, *United States Court of Appeals* for the District of Columbia, No. 6662, May 24th, 1937 (not reported), the court simply followed the Olmstead (*supra*) case, and rendered its opinion on that authority, without comment.

The Hearst Case

In the case of *Hearst* v. *Black*, decided by the same court (United States Court of Appeals for the District of Columbia), Case No. 6808, on November 9th, 1936 (not reported), Associate Justice GRONER, who also wrote the decision, in the Beard (*supra*), case, apparently was of a different opinion.

With reference to Section 605, Justice GRONER said in part:

> "The property rights in private telegrams is in no material respect different from the property right in letters" (*etc.*).

This case had to do with subpoenae *duces tecum* issued by the Senate Committee on the telegraph companies doing business in the City of Washington, for the delivery to the committee of all telegraph messages in the possession of said company.

Judge GRONER cited the Act, more particularly Section 605, and further stated:

> "The property rights in private telegrams is in no material respect different from the property right in letters and other writings; nor is there any good reason why the right of privacy in the one should be any greater than in the other. * * *
>
> "*In principle*, therefore, we think that a dragnet seizure of private telegraph messages as is alleged in the bill, whether made by persons professing to act *under color of authority from the government* or by persons acting as individuals, is a trespass which a court of equity has power to enjoin."

The communications companies are under a contract of duty not to disclose the contents of plaintiff's messages, except in compliance with due demand, and in accordance with due process of law.

The inviolate nature of telegraphic messages has long been up-held in Federal Courts.

Jones, Telegraph and Telephone Companies, Sec. 305 (1906);
Gray on Communications, etc., Sec. 25 (1885).

We respectfully submit that all of the foregoing applies with equal force to telephone messages.

Circuit Court Judge CHASE, writing the opinion in the case on appeal stated, with reference to the admissibility of evidence obtained by means of wiring tapping, that the Court was "bound to enforce the law as declared in the above (Olmstead) case", and found under this authority, that the evidence was admissible (R. 331).

He further stated however:

> "That would dispose of the point flatly were it a state rather than a federal law which forbade the interception of these messages. Yet in principle there is no distinction. Since there is no constitutional prohibition of their admission in evidence, it is necessary to their exclusion that some statute must so provide. Evidently Congress did not care for such a policy. As Chief Justice TAFT said: 'A standard which would forbid the reception of evidence if obtained by other than nice ethical conduct by government officials, would make society suffer and give criminals greater immunity than has been known heretofore.' Olmstead v. United States, *supra*" (R. 331).

The decision in the Olmstead case was by a divided bench, Associate Justices HOLMES, BRANDEIS, BUTLER and STONE dissenting, all writing dissenting opinions.

The Court was then dealing with niceties of conduct. Today this court is dealing with a clear and *premeditated violation of a Federal Statute.*

Even dealing with "nice ethical conduct by Government officials" (the characterization used by Chief Justice TAFT in the Olmstead [*supra*] case), when there was no Federal Communications Act in existence to prohibit same, and to emphasize the need for such an Act, which is now upon our statute books, may we respectfully quote from the dissenting opinions of the Learned Justices in the Olmstead (*supra*), case.

Quoting from the opinion of Mr. Justice HOLMES:

> "We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part" (p. 470).

Mr. Justice BRANDEIS said in part:

> "The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. * * * Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call [illegible] may call him. As a means of espionage, writs of assistants and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping" (pp. 475 and 476) * * *.
>
> "It is, of course, immaterial where the physical connection with the telephone wires leading into the defendants' premises was made. And it is also immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rules. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding" (p. 479) * * *.

"* * * As to nearly all the defendants (except those who admitted guilt), the evidence relied upon to secure a conviction consisted mainly of that which these officers had so obtained by violating the state law" (p. 482).

(Pleader—in this case now a Federal law.)

"Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. * * * To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face" (p. 485).

Your pleader could go on at great length in an endeavor to convince this Learned Court of the wrong that would be done to society at large, by permitting, encouraging and approving of the violation of law by Government officials, to seek evidence, but knows that his ability is limited and that it is a physical impossibility for him to even try to improve upon the terrific denunciations of such practice as set forth in the dissenting opinions in the Olmstead case.

It is sufficient to state, that although this was the minority opinion of the court at that time, subsequent thereto the Federal Communications Act was made the law of the land, and your pleader respectfully submits and feels that the minority opinions so written, together with this Act, now on our statute books, is ample justification to sustain the contention set forth in this brief.

It will also be noted that many of the telephone messages intercepted were conversations between parties who were not on trial, and some between parties not even named as defendants.

The record shows (R. 142 to 160) many of such messages between the defendant, Frank Carmine Nardone and his sister, Caroline, and with others, introduced into evidence, but which had absolutely nothing to do with the case on trial.

This is also true, of practically all of the messages reported, commencing at pages 174 to 181 of the Record.

Objection was made to these, not only on the original ground, but on the further ground that there was nothing in the messages that connected this defendant with any act charged in the indictment.

Then the following took place:

"The Court: Is there anything in the conversations saying anything about the source of it, in these conversations?

"Mr. Halle: Nothing.

"Mr. Dunigan: Nothing heretofore.

"The Court: Will there be other conversations?

"Mr. Dunigan: Yes, I will have another man on the stand to testify to numerous conversations.

"The Court: I think for the present I will take it if you can connect it. If not, it will go out" (p. 166, fol. 224).

The messages heretofore read, and more particularly the messages between defendant, Nardone, and his sister, Caroline, and others, not named as defendants or conspirators, were not connected.

A motion was later made by the attorney for Nardone, to strike out these said messages, and the court reserved decision (R. 186).

Motion was again renewed (R. 242) and at this time denied, to which exception was taken.

Telegrams

The trial court also admitted in evidence, in violation of this Act (Title 47, U. S. C. A., Section 605) and over objection timely made, numerous telegrams and telegraph money orders (R. 56 and 61).

None of these telegrams or money orders admitted, were sent by this appellant. They were not connected up with him, and many were sent by parties not on trial, or named as defendants.

Only a few need be referred to here, as all were inadmissible under the Act. Page 66 of the Record shows admission into evidence of Exhibit Number 6. The index describes this as a telegram to Conrad, unsigned (R. 325). There is no Conrad mentioned, either as a defendant or conspirator.

Telegraph money orders sent by Bishop to Baker, Exhibit 31 (Admitted R. 62), and Marchand to Miller, Exhibit 20 (R. 63) were between parties not named as defendants or conspirators.

In *"Cooley's Constitutional Limitations", 8th Ed. (1927)* Volume 1, on page 625, and following, the author entered into a long dissertation, showing that the reasoning of Chief Justice TAFT was in error. The author's arguments closely follow the line of reasoning in the dissenting opinions in the Olmstead case.

> "1. The statutes which forbid those intrusted with them from disclosing telegraphic communications are not restricted in their force to the imposition of penalties for disobedience, but they announce and establish a principle of public policy which is violated as distinctly as when a telegram is brought into court for public exposure as when it is privately shown to persons having no right to it. The disclosure contravening and tending to defeat the policy of the law cannot be legalized by any judicial command or license. * * *"

II

The admission of a telephone conversation relative to acts of violence not connected with the issues, was prejudicial and was grounds for a mis-trial, as far as the defendant Nardone was concerned.

The Government had called John Picarelli, an investigator of the Alcohol Tax Unit, as a witness (R. 130). His record of tapped telephone messages was bulked and classified as Exhibit 66 (R. 138).

Over strenuous objection, the court directed that this record be offered in evidence (R. 139).

After several messages were read by him, which were of no consequence, a message, dated February 25th, 1936, was read, and the entire conversation heard by the jury.

This message was presumed to be between the defendant Nardone, and an unidentified person called "Eddie". Said "Eddie" was alleged to have told Nardone about some State indictment against three other persons, not connected [illegible] whom was killed, and a question of money was brought up with reference, apparently, to their defense (R. 160).

The Government positively knew what was in this message, before it was read; knew that it had absolutely nothing to do with this case; knew that it was prejudicial to Nardone, and deliberately offered it in evidence.

> "Mr. Dunigan: No. 231 out of these 504 which the witness on the stand now would testify to. I have selected 72 out of 504. 700 wire taps were made" (R. 138).

Mr. Dunigan was the Assistant United States Attorney trying this case, and in this statement deliberately stated that he had selected this message, and had given it to the

witness to read, and at that time he knew full well it had nothing whatever to do with this case.

> "The Court (referring to above message): * * * How important are these conversations, about what happened, to the Government?
>
> "Mr. Dunigan: This particular one?
>
> "The Court: Yes.
>
> "Mr. Dunigan: I cannot attach any importance to that. I do not know what they mean when they say 'up above'" (R. 168).

As soon as this message was read (and counsel did not and could not know the contents of it, until it was read) counsel for the defendant Nardone, strenuously objected to same, and moved for a mis-trial (R. 161).

Motion for a mis-trial was denied, to which exception was taken, and the court then endeavored to cure the wrong by directing the jury to disregard the contents of the message.

However, the Court's direction was an absolute nullity.

> "The Court: February 25th, 1936, is stricken out. Gentlemen, do not consider it in any way at all, but take it out of your mind. That applies to any testimony stricken out during the trial" (R. 172).

The Government had offered 504 messages and had selected 72 out of the 504 to be read.

Many of the messages had been read, and the jury could not tell what the court meant, and to what message the court referred, in the above instructions, as there were other messages on February 25 (R. 172), later offered in bulk.

The Circuit Court of Appeals considered this message of vital importance, and the error a serious one. In the opinion rendered, considerable attention was given to this particular message.

Instead of incorporating the entire opinion in this brief, your pleader begs permission to point out the salient com-

ments of the Circuit Court of Appeals with reference to same.

> "Defendant Nardone's attorney expressed doubt as to the effectiveness of that" (striking out the evidence) "and insisting that the error could not be cured, declined the offer of the court to read just what was being struck out and stood upon his motion for a mistrial. * * * If incurable error was committed in reading this message to the jury, it is obvious that no harm was done any defendant but Nardone. The harm, if any, to him consisted in the showing of his interest in and willingness to help some unknown persons who had been indicted in a state court. The vice lay mainly in the guarded language used, * * *. *The general atmosphere of wrong doing hurt here* if anything about the message did. Then, too, *it is impossible to excuse the reading of a message which by its terms referred only to the claimed infraction of some state law having apparently nothing to do with the subject matter of the indictment on trial.*" (Italics ours.) (R. 330.)

The Appellate Court then continued to say that it thought the harm was so general and vague, that "we are not prepared to say that it was not cured by the prompt action of the court", and further that "the charges against Nardone in the indictment in this case were by competent evidence so clearly shown that a reversal on this point would be a plain miscarriage of justice" (R. 330).

The charges against Nardone in the indictment were not clearly shown by competent evidence.

As a matter of fact, there was no evidence against the defendant Nardone, that he had committed any overt act or participated in any of the acts charged in the indictment.

This was without question, a message offered to prejudice the jury against Nardone, constituted reversible error, and motion for mistrial should have been granted.

Marsh v. *U. S.*, 82 Fed. (2d) 703;
Leroy v. *Gov't of Canal Zone*, 81 F. (2d) 914;
Smith v. *U. S.* (*supra*).

"We think that these instructions failed to cure the error committed by the court in admitting the statements to be read to the jury as evidence in the case. The statements bore absolutely no relevancy to the issue made by the indictment and *tended only to confuse the jurors and lead them to associate the appellants with the murder."* Smith v. U. S. (*supra*).

III

The trial court erred in refusing to grant motion to dismiss indictment as against the defendant Nardone.

Ordinarily, this point would not be considered by this court. However, as the Circuit Court based its ruling, with reference to the foregoing message on their opinion "that the charges against Nardone in the indictment in this case were by competent evidence so clearly shown that a reversal on this point would be a plain miscarriage of justice" (R. 330), defendant-appellant Nardone, respectfully prays this court to scrutinize the evidence, if any, contained in the entire case, against the defendant, Nardone.

There was absolutely no evidence offered during the entire trial that the defendant Nardone, had done one single thing looking towards a consummation of the alleged conspiracy.

Nardone, without question, knew some of those mentioned as conspirators, and was seen at various times and in various places in their company, but that is as far as the proof went.

> "Where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction." (Citing many cases.)
>
> *Paul* v. *U. S.*, 79 Fed. (2d) 561.

"Mere knowledge of an unlawful conspiracy is not sufficient to make one a member thereof, but he must actively participate therein, before he is liable as a member. Young, et al. v. U. S. (C. C. A.), 48 Fed. (2d) 26; Thomas v. U. S. (C. C. A.), 57 F. (2d) 1039."

Zito v. *U. S.*, 64 F. (2d) 772;
Niccola v. *U. S.*, 72 F. (2d) 780;
U. S. v. *Buchalter and Shapiro* (C. C. A.), 2nd Circuit, March 8th, 1937;
Oras v. *U. S.*, 67 F. (2d) 463;
Dale v. *U. S.*, 66 Fed. (2d) 666;
U. S. v. *McClarty*, 191 F. 518;
Parnell v. *U. S.*, 64 F. (2d) 324.

In all of the foregoing cases, the courts have universally held that mere inactivity or even knowledge of a conspiracy without any overt act is not sufficient to convict defendant of being a part of the conspiracy.

It is possible and even probable that Nardone knew what some of these men were doing.

There is no proof that he did anything, except to associate with some of them at various times.

IV

Wherefore, it is respectfully submitted that under the foregoing, judgment of conviction entered herein should be reversed, so far as same affects the defendant Nardone, the indictment dismissed and defendant discharged.

Respectfully submitted,

THOMAS O'ROURKE GALLAGHER,
Attorney for Defendant-Appellant,
Frank Carmine Nardone.

APPENDIX

Statute Involved

Communications Act of 1934

Section 605 of the Federal Communications Commission Act of June 19, 1934, c. 652, 48 Stat. 1064, 1103 (U. S. C., Title 47, Sec. 605), the part of which is here material being italicized, is as follows:

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and *no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person;* and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not en-

titled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. [Italics ours.]

Section 501, the penal section of the statute, provides (48 Stat. 1100, U. S. C., Title 47, Sec. 501):

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both.

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No. 190

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

[illegible] MOORE, AUSTIN L. CALLAHAN, HUGH BROWN and ROBERT GOTTFRIED,

Appellants,

against

UNITED STATES OF AMERICA,

Respondent.

BRIEF ON BEHALF OF APPELLANT, ROBERT GOTTFRIED

LOUIS HALLE,
Attorney for Appellant,
Robert Gottfried.

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Supreme Court of the United States

FRANK CARMINE NARDONE, AUSTIN L. CALLAHAN, HUGH BROWN and ROBERT GOTTFRIED, Appellants, *against* UNITED STATES OF AMERICA, Respondent.	October Term, 1937.

BRIEF ON BEHALF OF APPELLANT, ROBERT GOTTFRIED

Opinion Below

The opinion rendered by the Circuit Court of Appeals (R., pp. 327-332) is reported in 90 Fed. (2), page 630.

Jurisdiction

The order of the Circuit Court of Appeals affirming the judgment of conviction was entered May 21, 1937 (R., p. 332). The petition for a writ of certiorari was granted on October 11th, 1937 (R., p. 333). The jurisdiction of this Court rests on Section 240-A of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

Whether the Government in a Federal criminal trial may introduce into evidence telephone messages intercepted by Government officials in violation of Title 47, U. S. C., Section 605.

Statute Involved

The statute involved (Title 47, U. S. C., Sec. 605), will be found in the Appendix, *infra,* page 15.

Statement

The appellants above named were charged in three counts contained in an indictment, to wit; Count I, with smuggling into the Port of New York, 1,800 cases of alcohol on March 17th, 1936, in violation of Title 19, United States Code, Section 1593A; Count II, with having possessed and concealed same thereafter, in violation of Title 19, United States Code, Section 1593B; Count III, with having conspired together with others to do these acts, in violation of Title 18, United States Code, Section 88. The conspiracy charged in the third Count, covered a period of time from October 15th, 1935, to May 15th, 1936 (R., pp. 2-7).

Upon the trial, the Government to prove its case on each of the three counts, called as witnesses a number of Federal Agents, who testified regarding conversations which they listened in to over tapped telephone wires.

The Assistant United States Attorney in charge of the prosecution stated the following (R., p. 138):

> "Mr. Dunnigan: No, 231 out of these 504 which the witness on the stand now would testify to. I have selected 72 out of 504. 700 wire taps were made.
>
> The Court: How many has this witness?
>
> Mr. Dunnigan: 72."

The witness, John Picarelli, an Investigator of the Alcohol Tax Unit, who intercepted the messages referred to by Mr. Dunnigan, testified (R., p. 131):

> "I was listening to conversations over a tapped wire."

He further testified (R., p. 181):

> "I was located when I tapped this wire at 134 Mulberry Street."

The witness Joseph A. Kozak, another Investigator of the Alcohol Tax Unit, stated (R., p. 187):

> "I intercepted and overheard probably several thousand, but recorded approximately 85 conversations."

This witness further stated that he did not have permission from the defendants to intercept or listen in, and that the wires were tapped by Government officers (R., pp. 192-193).

The Circuit Court in its opinion with regard to the telephone messages stated as follows (R., p. 329):

> "Of these all are merely frivolous except those which relate to the introduction into evidence of information obtained by wire tapping. It appeared that for some time before the defendants were arrested they had been under the observation of Federal agents and that about five hundred of their telephone calls had been made while government agents were (fol. 462) listening in and taking notes in so far as possible of what was said. Of these the prosecuting attorney selected 72 messages for introduction into evidence. They had a vital part in the government's proof and if they were erroneously admitted reversal must follow without question."

Section 605 of Title 47 legislates as to two distinct portions. The first portion refers to a person who receives or assists in receiving, or transmits or assists in transmitting the message which such person is prohibited from divulging, and it is as to that person who receives the information lawfully and in the course of the duties of his employment that provision is made for the divulging of the information received by him, pursuant to a subpoena.

The second portion of that section refers to a person who intercepts a message and as to him the statute clearly states he shall not divulge it to anybody. As to such interceptor, the section is silent about divulging under a subpoena. If Congress intended that such information should be available from an interceptor of a message pursuant to a subpoena, it would have inserted a clause about subpoenaing such information, the same as it did with respect to the first portion of the section, with respect to a person who lawfully receives the communication in the course of his employment.

As to whether the first portion which provides for the divulging of information under subpoena applies only to a subpoena in a civil case or whether it also includes the divulging pursuant to a subpoena in a criminal proceeding against the sender of such message, is not before the Court in this proceeding because the information which was divulged upon the trial herein was given by an interceptor.

That part of the statute which is pertinent to this question, provides that:

> "and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person."

The part of the Statute pertinent to the issue raised by the appellant Gottfried, prohibits anyone from intercepting a communication and divulging or publishing the existence, contents, substance, purport, effect or meaning of such communication to any person not authorized by the sender. This section aims to prevent wire tapping, and to prevent the divulging or publishing of any knowledge so gained, unless the person sending such message consents thereto.

Section 501 of the same title, provides the penalty for violating the provisions of Section 605. Section 501 will be found in the Appendix, *infra*, page 16.

Specification of Error to be Urged

The Circuit Court of Appeals erred in holding that statements made over telephone wires by the appellants which were intercepted by Government agents, in violation of Section 605, *supra,* were competent evidence against them.

SUMMARY OF ARGUMENT

POINT I

The Court below erred in construing that Section 605, supra, permits the admissibility of messages intercepted contrary to its provisions.

It is undisputed that the telephone wires over which the appellants spoke were tapped without their knowledge or consent. It is also conceded that this was done by Government agents (R., pp. 192-3).

The Circuit Court held in affirming the conviction that the case of *Olmstead* v. *United States,* 277 U. S. 438, 72 Law Ed. 944, was controlling, notwithstanding the later enactment of Section 605, Title 47, because that statute:

> "is silent as to the admissibility of messages intercepted contrary to its provisions. As Congress did not see fit to adopt the suggestion of direct legislation to make such evidence inadmissible, we are, of course, bound to enforce the law as declared in the above cases. That would dispose of the point flatly were it a state rather than a federal law which forbade the interception of these messages. Yet in principle there is no distinction. Since there is no constitutional prohibition of their admission in evidence, it is necessary to their exclusion that some statute must so provide" (R., p. 331).

In the Olmstead case, *supra* (at p. 465), this Court stated with reference to the secrecy of telephone messages, as follows:

"Congress may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in Federal criminal trials, by direct legislation, and thus depart from the common law of evidence. But the Courts may not adopt such a policy by attributing an enlarged and unusual meaning to the 4th Amendment."

"In the absence of controlling legislation by Congress, those who realize the difficulties in bringing offenders to justice may well deem it wise that the exclusion of evidence should be confined to cases where rights under the Constitution would be violated by admitting it."

Counsel submits that the subsequent enactment of Section 605, *supra,* making telephone messages secret and by Section 501 prescribing the penalty for a violation thereof, Congress did the very thing which this Court suggested it could do to make telephone messages secret, and said legislation is therefore controlling in the case at bar.

The Federal Statute differs from the Washington State Statute [Appendix, *infra,* p. 17] for it not only prohibits wire tapping, but also prohibits divulging or publishing the message without the consent of the sender. Furthermore, the Court in the Olmstead case, expressed the view that the Washington State Statute could not affect the rules of evidence applicable in Courts of the United States.

The following cases are submitted as to the effect the Courts should give to acts of Congress:

Lincoln v. *Ricketts,* 297 U. S. 373, at page 376:

"In construing the words of an act of Congress, we seek the legislative intent. We give to the words their natural significance unless that leads to an unreasonable result plainly at variance with the evident purpose of the legislation. Ozawa v. United States, 260 U. S. 178, 180, 194, 67 Law Ed. 199, 209, 43 S. Ct. 65; Ohio v.

Helvering, 292 U. S. 360, 370, 78 Law Ed. 1307, 1310, 54 S. Ct. 725."

Gulf States Steel Company v. *U. S.*, 287 U. S. 32, 77 Law Ed. 150, at page 45:

"When possible, every statute should be rationally interpreted with the view of carrying out the legislative intent."

Fong Yue Ting v. *United States*, 149 U. S. 698, 37 Law Ed. 905, at page 712:

"As long ago said by Chief Justice Marshall, and since constantly maintained by this court: 'The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.'" "Where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This Court disclaims all pretensions to such a power." McCullough v. Maryland, 17 U. S. 4 Wheat. 316, 421, 423 [4, 579, 605]; Juillard v. Greenman, 110 U. S. 421, 440, 450 [28, 204, 211, 215]; Ex parte Yarbrough, 110 U. S. 651, 658 [28, 274, 276]; Re Rapier, 143 U. S. 110, 134 [36, 93, 102]; Logan v. U. S. 144 U. S. 263, 283 [36, 429, 435].

At page 720:

> "In our jurisprudence, it is well settled that the provision of an Act of Congress, passed in the exercise of its constitutional authority, on this, as on any other subject, if clear and explicit, must be upheld by the courts, * * *."

At page 731:

> "* * *, the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject."

Commissioner of Immigration v. *Gottlieb,* 265 U. S. 310, 68 Law Ed. 1031, at page 313:

> "But if the plain words of the statute are against such a conclusion, leaving no room for construction, the courts have no choice but to follow it, without regard to the consequences."

Ex Parte Public National Bank, 278 U. S. 101, 73 Law Ed. 202, at page 104:

> "But we are not at liberty thus to deny effect to a part of a statute. No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word."

In view of the foregoing decisions, counsel submits that the only reasonable construction that may be accorded Section 605, *supra,* is, that the messages should not have been allowed into evidence, when it appeared that the wire-tapping and intercepting was done without the consent of the

appellants. The other construction, to wit: that the evidence although illegally obtained may be divulged in Court, will deny to the sender of the message the right of secrecy given to him by the Statute, nullifying the protective cloak intended by Congress to be thrown around the secrecy of telephone messages.

In the Olmstead case, at page 464, the Court ruled that the case of *Ex Parte Jackson,* 96 U. S. 727, 24 Law Ed. 877, did not apply, because:

> "The United States takes no such care of telegraph or telephone messages as of mailed sealed letters."

Counsel submits that this ruling is no longer controlling, as Section 605, *supra,* gives the same right of secrecy to persons to telegraph and telephone messages as Section 259, Title 39 [Appendix, *infra,* p. 17] gives to persons to sealed letters sent through the mails. The Court in the Jackson case, *supra,* at page 733, states the following:

> "Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domicils. The constitutional guarantee of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be."

In the *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 64 Law Ed. 319, at page 392, the Court states:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independ-

ent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed."

The foregoing applies with equal force here, for in the case at bar, it is conceded that the wire tapping was done by a Government Agent, and the knowledge of the contents of the message was acquired in a manner forbidden by Section 605, *supra*.

POINT II

The defendants' rights under the fourth and fifth amendments were violated by allowing into evidence the contents of the messages illegally acquired by Government officers.

Prior to the enactment of Section 605, a person was not entitled to the secrecy of messages sent over the telegraph or telephone wires. Olmstead case, *supra*. Since the enactment of that statute, this right of secrecy became a personal right which only the sender of the message could waive, and any one divulging or publishing such message without his consent is guilty of an offense punishable by fine and imprisonment. This part of the Statute does not except any place where the message may be published or divulged, nor does Section 501 except any person from punishment for such violation.

Under Article 6 of the Constitution, Clause 2 [Appendix, *infra*, p. 16] the laws of the United States are as much the Supreme Law of the Land, as the Constitution, and when Congress enacted Section 605, *supra*, it gave to persons that right of secrecy to messages. It follows that this right is violated when a Government official is permitted on the witness stand to divulge the contents of any message illegally obtained by him.

In *Boyd* v. *U. S.*, 116 U. S. 616, at page 630), 29 Law Ed. 746, the Court in discussing the rights of persons under the

4th and 5th Amendments [Appendix, *infra,* pp. 16-17 to the Constitution, states as follows:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of a crime or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other."

In the case of *United States* v. *Lefkowitz,* 285 U. S. 452; 76 Law Ed. 833, at page 466, on the same question, the Court states:

> "The teachings of that great case were cherished by our statesmen when the Constitution was adopted. In Boyd v. United States, *supra* (116 U. S. 630, 29 Law ed. 751, 6 S. Ct. 524), this Court said: 'The principles laid down in this opinion (Entick v. Carrington) affect the very essence of constitutional liberty and security. * * * They apply to all invasions on the

> part of the Government and its employees of the sanctity of a man's home and the privacies of life. * * * Any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the 4th and 5th Amendments run almost into each other.' "

In the *Silverthorne Lumber* case, *supra*, the Court at page 391, states:

> "The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession, but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. Weeks v. United States, 232 U. S. 383, 58 L. ed. 652, L. R. A. 1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1117, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the 4th Amendment to a form of words."

There is no distinction between studying papers illegally seized and using the knowledge obtained therefrom, and listening in over a telephone, making notes of the conversation and then divulging the contents thereof on a witness stand.

Not only was this evidence incompetent by reason of it being obtained by Government officers in violation of Sec-

tion 605, *supra*, but also because of the invasion of the Constitutional rights of the appellants.

In *Weeks* v. *U. S.*, 232 U. S. 383, 58 Law Ed. 652, the Court in construing the rights of persons when they are interfered with by the Government and its officers, states the following at page 394:

> "This protection is equally extended to the action of the Government and officers of the law acting under it. Boyd case, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524. To sanction such proceedings, a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."

In the *Gouled* v. *United States*, 255 U. S. 298, 65 Law Ed. 647, case, there were two questions before the Court:

First:

> "Is the secret taking, without force, from the house or office of one suspected of crime, of a paper belonging to him, of evidential value only, by a representative of any branch or subdivision of the government of the United States, a violation of the 4th Amendment?"

Second:

> "Is the admission of such paper in evidence against the same person, when indicted for crime, a violation of the 5th Amendment?"

Both of these questions were answered by the Court in the affirmative.

There is no material distinction in the Gouled case from the facts in the case at bar, wherein it appears that a Government official, in violation of Section 605, tapped the wires, intercepted the message and testified to the contents

thereof in the trial against the defendant. There is no material difference between what a person writes on a piece of paper or what he says over the telephone, where the privacy of each is protected by the law.

Conclusion

For the reasons advanced, it is submitted that the judgment of conviction of the Court below should be reversed.

LOUIS HALLE,
Attorney for Appellant,
Robert Gottfried.

Appendix

Section 605, Title 47, U. S. C.

Unauthorized publication or use of communications.

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto:

Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. (June 19, 1934, c. 652, Section 605, 48 Stat. 1103.)

Section 501, Title 47, U. S. C.

General penalty.

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both. (June 19, 1934, c. 652, Section 501, 48 Stat. 1100.)

Article 6 of the Constitution, Clause 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding."

FOURTH AMENDMENT TO THE CONSTITUTION

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

FIFTH AMENDMENT TO THE CONSTITUTION

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * * nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

WASHINGTON STATUTE

Section 2656.

"Every person—

(18) Who shall intercept, read or in any manner interrupt or delay the sending of a message over any telegraph or telephone line, shall be guilty of a misdemeanor. (L. '09, p. 1016, Section 404.)"

Section 259, Title 39, U. S. C.

Mail of persons conducting lotteries or fraudulent schemes returned; evidence of agency. The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot,

chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person or company, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof; and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. Nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. The public advertisement by such person or company so conducting such lottery, gift, enterprise, scheme, or device, that remittances for the same may be made by mail to any other person, firm, bank, corporation, or association named therein shall be held to be *prima facie* evidence of the existence of said agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself. (R. S., Section 3929; Sept. 19, 1890, c. 908, Section 2, 26 Stat. 466; Mar. 2, 1895, c. 191, Section 4, 28 Stat. 964.)

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8991—37

In the Supreme Court of the United States

OCTOBER TERM, 1937

FRANK CARMINE NARDONE, AUSTIN L. CALLAHAN, HUGH BROWN AND ROBERT GOTTFRIED, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 458–463) has not yet been reported. The District Court for the Southern District of New York rendered no opinion.

JURISDICTION

The judgment sought to be reviewed was entered June 21, 1937. (R. 463.) The petition for a writ of certiorari was filed July 3, 1937. The jurisdiction of this Court is invoked under Section 240 (a)

of the Judicial Code as amended. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether evidence procured by tapping telephone wires and intercepting telephone messages is inadmissible in a Federal prosecution in view of Section 605 of the Federal Communications Commission Act of June 19, 1934.

STATUTE INVOLVED

Section 605 of the Federal Communications Commission Act of June 19, 1934, c. 652, 48 Stat. 1064, 1103 (U. S. C., Title 47, Sec. 605), the part of which is here material being italicized, is as follows:

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court

of competent jurisdiction, or on demand of other lawful authority; and *no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person;* and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. [Italics ours.]

Section 501, the penal section of the statute, provides (48 Stat. 1100, U. S. C., Title 47, Sec. 501):

Any person who willfully and knowingly does or causes or suffers to be done any act,

matter, or thing, in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both.

STATEMENT

On May 15, 1936, an indictment in three counts was returned against the petitioners in the Southern District of New York growing out of the smuggling of a large quantity of alcohol. (R. 3–10.) Each of the petitioners was convicted upon all of the counts. (R. 400.) Petitioner Nardone was sentenced to three years' imprisonment and the other petitioners to a year and a day. (R. 401.)

Without citation to the record, the petitioners allege that the trial court committed reversible error in permitting the introduction in evidence over their objection of a number of telephone conversations between the petitioners and others which Federal agents had intercepted by means of tapped wires. (Pet. p. 2.) The Circuit Court of Appeals in its opinion states that the prosecuting attorney selected for introduction in evidence 72 of the some 500 telephone conversations to which

the agents listened and of which they made notes. (R. 460.) The Circuit Court of Appeals further stated that enough of these messages were interstate and foreign as to render it unnecessary to make any distinction between what were purely intrastate and what were not (R. 462), and that the messages "had a vital part in the government's proof and if they were erroneously admitted reversal must follow without question." (R. 460.) The messages to which reference has been made were apparently those testified to by one Picarelli, an agent of the Alcohol Tax Unit. (R. 175–234, 236–253.) It is not contended that the tapping of the telephone wires was accomplished through any trespass committed upon property of the petitioners.

The Circuit Court of Appeals held that the evidence as to the telephone conversations was properly admitted and unanimously affirmed the convictions of the petitioners. (R. 461–463.)

ARGUMENT

The only question presented is whether Section 605 of the Federal Communications Commission Act of 1934, *supra,* prohibits the introduction in evidence in a criminal trial in a Federal court of telephone conversations overheard by Federal agents by means of tapped wires.

In *Olmstead* v. *United States,* 277 U. S. 438, this Court held that the use of such evidence did not

constitute a violation of the Fourth and Fifth Amendments. This Court also held that such evidence was not inadmissible because the mode of obtaining it was a misdemeanor under state statute. After stating (p. 467) that "The common law rule is that the admissibility of evidence is not affected by the illegality of the means by which it was obtained," this Court said (pp. 468–469):

> The statute of Washington, adopted in 1909, provides (Remington Compiled Statutes, 1922, § 2656–18) that:
>
> "'Every person * * * who shall intercept, read or in any manner interrupt or delay the sending of a message over any telegraph or telephone line * * * shall be guilty of a misdemeanor."
>
> This statute does not declare that evidence obtained by such interception shall be inadmissible, and by the common law, already referred to, it would not be. *People* v. *McDonald*, 177 App. Div. (N. Y.) 806. * * *

In the course of its opinion the Court also said (pp. 465–466):

> Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence.

The *Olmstead* decision was rendered by this Court in 1928, and it is the position of the petitioners that Section 605 was inserted in the Federal

Communications Commission Act of 1934 as a result of the statement by this Court in that decision as to the undoubted power of Congress to provide by direct legislation for the inadmissibility in evidence in a Federal criminal prosecution of evidence obtained by means of wire tapping. Petitioners assert, therefore, that the *Olmstead* decision is not controlling in the instant case.

That there is no merit in the petitioners' position is apparent from the fact that the same language that the petitioners rely upon in Section 605 of the Federal Communications Commission Act of 1934 was employed, *mutatis mutandis,* in the Radio Act of February 23, 1927, c. 169, Sec. 27, 44 Stat. 1162, 1172, which was enacted over a year prior to the decision in the *Olmstead case* and, of course, involved a subject matter as to which wire tapping was not germane. As found in the Radio Act of 1927, the provision read:

> no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person; * * *.

Moreover, it must be obvious that the language found in Section 605 of the Federal Communications Commission Act of 1934, although broad, is not the language that would ordinarily have been employed if Congress had had in mind a direct prohibition of the use in evidence of telephone mes-

sages intercepted as the result of wire tapping. In addition, the announced purpose of the Federal Communications Commission Act is devoid of any suggestion that Congress had any such object in mind. (Section 1, 48 Stat. 1064, U. S. C., Title 47, Sec. 151.)

Read in the light of the subsequent provisions in Section 605, it is evident that the provision in question was aimed primarily at the unauthorized publication of radio, telegraph and telephone communications for purposes of private gain or benefit. Thus construed, the provision constitutes a statutory affirmation in the field of communication by radio and wire of principles long established in connection with private letters and other similar writings.

In *Folsom* v. *Marsh,* 9 Fed. Cas. 342, 346, Mr. Justice Story said:

> In short, the person, to whom letters are addressed, has but a limited right, or special property, (if I may so call it), in such letters, as a trustee, or bailee, for particular purposes, either of information or of protection, or of support of his own rights and character. The general property, and the general rights incident to property, belong to the writer, whether the letters are literary compositions, or familiar letters, or details of facts, or letters of business. * * * *A fortiori,* third persons standing in no privity

> with either party, are not entitled to publish them, to subserve their own private purposes of interest, or curiosity, or passion.

See also Notes in 37 L. R. A. (N. S.) 944 and 51 L. R. A. 353; *Baker* v. *Libbie,* 210 Mass. 599; *Knights of the K. K. Klan* v. *International Magazine Co.,* 294 Fed. 661 (C. C. A. 2d). A recognized exception to the general rule, however, is "that 'for the purposes of public justice publicly administered, according to the established institutions of the country,' private letters in the hands of a party other than the writer must always be produced unless such letters would tend to criminate the person required by law to produce them." *Barrett* v. *Fish,* 72 Vt. 18, 51 L. R. A. 754, and Note; *King* v. *King,* 25 Wyo. 275, 285.

Moreover, although the Federal Communications Commission Act was passed over six years after the decision of this Court in the *Olmstead* case, there is nothing in the legislative history of Section 605 which indicates that Congress had in mind the prohibition of the use of evidence obtained as a result of wire tapping. In submitting its report on the bill, the Senate Committee on Interstate Commerce simply said:

> Section 605 prohibiting unauthorized publication of communications, is based upon Section 27 of the Radio Act and extends it to wire communications. S. Rep. No. 781, 73d Cong., 2d Sess. p. 11, Con. Doc. 9770.

The question presented was directly involved in the case of *Smith* v. *United States* (unreported), May 24, 1937. The Court of Appeals for the District of Columbia, in holding that evidence obtained by means of wire tapping was admissible, said:

> The second assignment relied upon by appellants is that evidence secured by wire tapping was admitted by the trial court against the objections and exceptions of appellants. This assignment must be overruled upon the authority of *Olmstead* v. *United States,* 277 U. S. 438. See also: *Beard* v. *U. S.,* 65 App. D. C. 231; 82 F. (2d) 837. It is also alleged by appellants that such evidence was illegal under the provisions of the act of Congress commonly known as the Communications Act of 1935, sec. 605, tit. 47 U. S. C. We cannot however sustain this contention. *Olmstead* v. *United States, supra.*

Beard v. *United States,* 82 F. (2d) 837, 841 (App. D. C.), certiorari denied, 298 U. S. 655, cited in the above opinion, was decided after the ~~*Olmstead* case~~. statute involved was pas

Hearst v. *Black* 87 F. (2d) 68 (App. D. C.), cited by the petitioners, was decided by the same court which decided the *Smith* case, *supra.* The question here presented was not involved.

CONCLUSION

The case was correctly decided below and there is involved no conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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August, 1937.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 190

FRANK CARMINE NARDONE, AUSTIN L. CALLAHAN, HUGH BROWN, AND ROBERT GOTTFRIED, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 327–332) is reported in 90 F. (2d) 630. The District Court for the Southern District of New York rendered no opinion.

JURISDICTION

The judgment sought to be reviewed was entered June 21, 1937 (R. 332). The petition for a writ of certiorari was filed July 3, 1937 and granted October 11, 1937. The jurisdiction of this Court

is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

The sole question presented is whether evidence procured by tapping telephone wires and intercepting telephone messages is inadmissible in a Federal prosecution in view of Section 605 of the Federal Communications Act of 1934.

STATUTES INVOLVED

Section 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1064, 1103; U. S. C., Title 47, Sec. 605:

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may

be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

Section 501 (the penal section of the Federal Communications Act) c. 652, 48 Stat. 1064, 1100; U. S. C., Title 47, Sec. 501:

> Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both.

STATEMENT

On May 15, 1936, an indictment in three counts was returned against the petitioners in the Southern District of New York growing out of the smuggling of a large quantity of alcohol. (R. 2–7.) Each of the petitioners was convicted upon all of the counts. (R. 289.) Petitioner Nardone was sentenced to three years' imprisonment and the other petitioners to a year and a day. (R. 291.)

The petitioners allege that the trial court committed reversible error in permitting the introduction in evidence over their objection of a number of telephone conversations between the petitioners and others which Federal agents had intercepted by means of tapped wires. (Pet. p. 2). The Cir-

cuit Court of Appeals in its opinion states that the prosecuting attorney selected for introduction in evidence 72 of the some 500 telephone conversations to which the agents listened and of which they made notes. (R. 329.) The Circuit Court of Appeals further stated that enough of these messages were interstate and foreign as to render it unnecessary to make any distinction between what were purely intrastate and what were not (R. 331), and that the messages "had a vital part in the government's proof and if they were erroneously admitted reversal must follow without question." (R. 329.) The messages to which reference has been made were apparently those testified to by one Picarelli, an agent of the Alcohol Tax Unit. (R. 130–172, 174–186.) It is not contended that the tapping of the telephone wires was accomplished through any trespass committed upon property of the petitioners.

The Circuit Court of Appeals held that the evidence as to the telephone conversations was properly admitted and unanimously affirmed the convictions of the petitioners. (R. 327–332.) A petition for certiorari on the ground that Section 605 of the Communications Act of 1934 rendered such evidence inadmissible was granted.

SUMMARY OF ARGUMENT

1. The evidence obtained by wire tapping was admissible against petitioners under the decision of this Court in *Olmstead* v. *United States,* 277

U. S. 438. The only distinction in fact between that case and this is that there a State statute prohibited wire tapping and here it is urged that the wire tapping constituted a violation of Section 605 of the Communications Act of 1934. But that distinction is not material. The doctrine laid down in the *Olmstead* case is that since wire tapping does not violate the Constitution, evidence so obtained is admissible under the common law of evidence no matter how illegally obtained.

2. Section 605 of the Communications Act does not make evidence obtained by wire tapping inadmissible. Section 605 does not expressly purport to change the common law rule reaffirmed by the *Olmstead* case. Congress considered the *Olmstead* decision at length and rejected many express proposals to prohibit wire tapping and make evidence so obtained inadmissible. Thereafter, Congress passed the Communications Act of 1934. There is not the slightest indication in the legislative history of that Act that Congress was dealing with the question of wire tapping evidence in the Federal courts. The purpose of the Communications Act was to transfer administrative jurisdiction over Federal communications to the newly created Federal Communications Commission. Section 605 merely extended to wire communications the provisions of the Radio Act of 1927, prohibiting unauthorized publication of communications.

ARGUMENT

I

UNLESS THE LAW SETTLED BY THIS COURT IN *OLMSTEAD* V. *UNITED STATES* HAS BEEN CHANGED BY DIRECT LEGISLATION OF CONGRESS, THE DECISION IN THAT CASE IS CONTROLLING HERE

Petitioners contend that Congress in Section 605 of the Federal Communications Act of 1934 changed the law settled by this Court in *Olmstead* v. *United States,* 277 U. S. 438, and directly prohibited the introduction in evidence in a Federal criminal prosecution of conversations overheard by Federal agents by means of tapping telephone wires. Unless petitioners are right on that contention, which point is discussed *infra,* p. 12, there can be little question that the *Olmstead* case is controlling in the case at bar. This petitioners do not deny.

The question before the Court in the *Olmstead* case was the same as that here: Whether evidence obtained by Federal agents through the use of wire tapping is admissible in a Federal criminal prosecution. And this Court held that such evidence is admissible. There as here the contention was made by the petitioners that the interception of telephone messages by means of wire tapping was illegal. The only possible difference between the cases is that petitioners in the *Olmstead* case urged that the wire tapping activities of the Federal agents violated State law (277 U. S. 466),

whereas here it might be urged that Section 605 of the Federal Communications Act, *supra*, p. 2, was violated. But that difference is immaterial.

After holding that the obtaining of evidence by wire tapping does not violate the Constitution, the majority of this Court in the *Olmstead* case held that such evidence must be allowed under the common law rule that "the admissibility of evidence is not affected by the illegality of the means by which it was obtained." 277 U. S. at p. 467. Chief Justice Taft, writing for the majority, said (pp. 467–468):

> The rule is supported by many English and American cases cited by Jones in vol. 5, § 2075, note 3, and § 2076, note 6; and by Wigmore, vol. 4, § 2183. It is recognized by this Court in *Adams* v. *New York*, 192 U. S. 585. The *Weeks* case, announced an exception to the common law rule by excluding all evidence in the procuring of which government officials took part by methods forbidden by the Fourth and Fifth Amendments. Many state courts do not follow the *Weeks* case. . . . But those who do, treat it as an exception to the general common law rule and required by constitutional limitations. . . . The common law rule must apply in the case at bar.
>
> Nor can we, without the sanction of congressional enactment, subscribe to the suggestion that the courts have a discretion to exclude evidence, the admission of which is not unconstitutional, because unethically

secured. This would be at variance with the common law doctrine generally supported by authority. There is no case that sustains, nor any recognized text book that gives color to such a view. Our general experience shows that much evidence has always been receivable although not obtained by conformity to the highest ethics. The history of criminal trials shows numerous cases of prosecutions of oath-bound conspiracies for murder, robbery, and other crimes, where officers of the law have disguised themselves and joined the organizations, taken the oaths and given themselves every appearance of active members engaged in the promotion of crime, for the purpose of securing evidence. Evidence secured by such means has always been received.

A standard which would forbid the reception of *evidence if obtained by* other than nice ethical conduct by government officials would make society suffer and give criminals greater immunity than has been known heretofore. In the absence of controlling legislation by Congress, those who realize the difficulties in bringing offenders to justice may well deem it wise that the exclusion of evidence should be confined to cases where rights under the Constitution would be violated by admitting it.

Thus the decision of the majority, based as it is upon the presence or absence of an invasion of rights under the Constitution, recognizes no dis-

tinction between the violation of a Federal statute and the violation of a State statute by wire tapping. Cf. *Burdeau* v. *McDowell,* 256 U. S. 465; *Hester* v. *United States,* 265 U. S. 57; *McGuire* v. *United States,* 273 U. S. 95, 99.

The breadth of the majority's decision is further emphasized by the contentions of the minority which were rejected in the *Olmstead* case. Justices Holmes, Brandeis, and Stone dissented on the broad ground that the evidence obtained by wire tapping should be inadmissible regardless of any invasion of rights under the Constitution since it was obtained by unethical or criminal activity by Government officers.[1] It is clear that no distinction is made in their opinions between activity criminal under a State statute and activity criminal under a Federal statute. Justice Holmes expressly stated that "it makes no difference that in this case wire tapping is made a crime by the law of the State, not by the law of the United States." 277 U. S., at p. 470. And the rationale of "unclean hands" developed by Mr. Justice Brandeis (277 U. S., at pp. 483–485) is as applicable to violations of Federal law as it is to violations of State law.

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[1] Justices Brandeis and Stone also dissented on the ground that obtaining evidence by wire tapping does invade rights guaranteed by the Fourth Amendment. Justice Butler dissented on the constitutional question alone and voiced no opinion as to the bearing of the ethics or criminal nature of wire tapping upon the admission of evidence obtained by wire tapping.

Finally, it is significant that the Federal courts have uniformly considered the *Olmstead* case controlling on the general proposition that in the absence of legislation by Congress evidence even though unethically or illegally obtained is admissible unless rights under the Constitution have been invaded. *Joong Sui Noon* v. *United States,* 76 F. (2d) 249 (C. C. A. 8th); *United States* v. *Lee Hee,* 60 F. (2d) 924 (C. C. A. 2d); *McMann* v. *Engel,* 16 F. Supp. 446, 448, affirmed without discussion of this point, 87 F. (2d) 377 (C. C. A. 2d); *In re Dooley,* 42 F. (2d) 562 (S. D. N. Y.); *United States* v. *Fifty-Eight Drums of Material,* 38 F. (2d) 1005 (W. D. Pa.)

Since there is no distinction between the present case and the *Olmstead* case, there was no error in the admission here of the evidence obtained by wire tapping, and the judgment below must be affirmed on the authority of the *Olmstead* case and the many Federal cases which have followed it.[2]

---

[2] The lower Federal courts in the following cases have held themselves bound by the authority of *Olmstead* v. *United States* on the specific question of admissibility of evidence obtained by wire tapping. *Beard* v. *United States*, 82 F. (2d) 837 (App. D. C. 1935), certiorari denied, 298 U. S. 655; *Foley* v. *United States*, 64 F. (2d) 1 (C. C. A. 5th, 1933), certiorari denied, 289 U. S. 762; *Morton* v. *United States*, 60 F. (2d) 696 (C. C. A. 7th, 1932), certiorari denied, 288 U. S. 607; *Smith* v. *United States*, 91 F. (2d) 556 (App. D. C., 1937); *Bushouse* v. *United States*, 67 F. (2d) 843 (C. C. A. 6th, 1933); *Kerns* v. *United States*, 50 F. (2d) 602 (C. C. A. 6th, 1931); and the decision below in the case at bar, 90 F. (2d) 630 (R. 327).

But petitioners maintain that Congress in Section 605 of the Federal Communications Act changed the rule of the *Olmstead* case and prohibited the admission of wire tapping evidence in the Federal courts. Our remaining argument is directed to this question.

II

SECTION 605 OF THE COMMUNICATIONS ACT OF 1934 DOES NOT CHANGE THE RULE OF *OLMSTEAD* V. *UNITED STATES*

The opinion of the Court in the *Olmstead* case points out that Congress may change the common law rule of evidence settled and reaffirmed in that case by legislation specifically prohibiting the introduction in Federal criminal trials of evidence obtained by wire tapping (277 U. S. at p. 465):

> Congress may of course protect the secrecy of telephone messages by making them when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence.

The *Olmstead* case was decided in 1928. It is contended that Section 605 of the Communications Act of 1934, passed six years later, is the response of Congress to the suggestion of this Court that Congress could directly prohibit wire tapping evidence. That part of Section 605 relied on by appellants reads:

> * * * no person not being authorized by the sender shall intercept any communica-

> tion and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person * * *.

What was said by this Court in the *Olmstead* case in construing the Washington statute there involved [3] is equally applicable to Section 605. "This statute does not declare that evidence obtained by such interception shall be inadmissible, and by the common law already referred to, it would not be." 277 U. S. at p. 469.

Petitioners urge a construction of Section 605 in derogation of the common law, and their contention calls for an application of the familiar rule that a statute in derogation of the common law is to be strictly construed. This is particularly true here where the common law rule permitting evidence by wire tapping has been fully reaffirmed and restated by this Court in the widely discussed *Olmstead* decision. The intent of Congress to prohibit wire tapping evidence must plainly and affirmatively appear. It is inconceivable that Congress for reasons of grave public policy would reject the common law rule and repudiate the consequences of the *Olmstead* decision without due

[3] The pertinent provision of the Washington statute involved in the *Olmstead* case as set forth in the opinion in that case (p. 468) reads:

"Every person * * * who shall intercept, read or in any manner interrupt or delay the sending of a message over any telegraph or telephone line * * * shall be guilty of a misdemeanor."

consideration revealing its express intention to do so.

Examination of pertinent Congressional action since the *Olmstead* case not only fails to show the plain intention of Congress in Section 605 to prohibit the use of evidence obtained by wire tapping, but affirmatively demonstrates a complete lack of such intention.

(A) CONGRESS AFTER FULL CONSIDERATION OF OLMSTEAD V. UNITED STATES HAS REPEATEDLY DECLINED TO MAKE EVIDENCE OBTAINED BY WIRE TAPPING INADMISSIBLE IN THE FEDERAL COURTS

The 71st and 72d Congresses debated at length the decision of this Court in the *Olmstead* case, particularly with reference to the suggestion that a change in the common law to prohibit the admissibility of wire tapping evidence in Federal criminal trials was a question of policy for Congress to determine. Congressional committees gathered full data on the subject of wire tapping. Opponents of wire tapping in Congress endeavored many times to enact legislation prohibiting wire tapping and making evidence so obtained inadmissible. All proposed legislation to prohibit wire tapping and the use of evidence obtained by wire tapping was rejected by Congress.

Three bills were proposed in the 71st Congress to prohibit wire tapping, H. R. 5416, H. R. 4139, and S. 6061. H. R. 5416, designed also to pro-

hibit the use of wire tapping evidence in the courts of the United States, was entitled:

> A bill to prohibit the tapping of telephone and telegraph lines and prohibiting the use of information obtained by such illegal tapping to be used as evidence in the courts of the United States in civil suits and criminal prosecutions and for other purposes.

H. R. 5416, introduced on November 21, 1929, was debated on November 22, and its relationship to the *Olmstead* case discussed. Cong. Rec., Vol. 71, Part 5, p. 5968.

Congress gathered information on the extent of and necessity for the use of the wire tap, and eventually all three of the bills proposed to prohibit wire tapping and wire tapping evidence failed of passage.

In December, 1929, the House Appropriations Committee held hearings on the 1931 Department of Justice Appropriation Bill. The Director of the Federal Bureau of Investigation was called before the Committee and closely questioned on the practice of the Bureau in the tapping of telephone wires. Hearings of the Appropriations Committee of the House of Representatives on the Justice Department Appropriation Bill for the fiscal yea. 1931, December 2, 1929, p. 63.

The Department of Justice Appropriation Bill was debated in the House on January 22, 1931. An amendment was offered providing that no part of

the appropriation could be used for tapping telephone or telegraph wires. Representative Tinkham in support of the amendment read extensively from the dissenting opinions of Justices Brandeis and Holmes in the *Olmstead* case. Five pages of the Congressional Record record the heated discussion of the amendment. Cong. Rec., Vol. 74, Part 3, pp. 2901–2906. It was defeated by a vote of 99 to 78.

Shortly thereafter an amendment to the National Prohibition Act for the District of Columbia to prohibit wire tapping was proposed in the Senate. An amendment to the amendment was proposed to prohibit the use of information so obtained as evidence of violations. Cong. Rec., Vol. 74, Part 4, p. 3928. Neither the original amendment, nor the amendment thereto, was finally incorporated in the bill.

Again, Congress made a thorough inquiry as to the extent of the use of, and necessity for, the wire tap. On February 19, 1931, the House Committee on Expenditures in Executive Departments met to ascertain the regulations and practices employed by the Government's investigative units in making use of wire tapping. Attorney General Mitchell and Prohibition Director Woodcock were called to appear before the Committee which held hearings in addition and supplementary to the hearings before the House Appropriations Committee in 1929. The hearings were published and made available to all the members of Congress. The evidence sub-

mitted at these hearings is highly significant in showing what information was in the possession of Congress at the various times it considered and rejected proposals to prohibit or limit wire tapping, and make wire tapping evidence inadmissible. The information given to Congress at this hearing may be classified as follows: (1) Regulations of the Department of Justice restricting the use of the wire tap in investigation; (2) the text of prevailing State statutes prohibiting wire tapping; (3) an analysis of all methods of investigation and the part played by wire tapping in the general scheme; (4) description of the limited class of cases in which the wire tapping device was considered necessary; (5) a table showing the very small proportion of cases in which the wire tap was used; (6) general statement of policy regarding the use of the wire tap. The text of the statutes of 32 States which prohibit wire tapping was before the Committee, and it is notable that not one of those statutes made evidence obtained by wire tapping inadmissible in criminal proceedings. Hearings, Committee on Expenditures in the Executive Departments, February 19, 1931, pp. 5–14.

Extracts from the printed hearings of the testimony and exhibits presented by Attorney General Mitchell showed that under the regulations and policy of the Department of Justice wire tapping is strictly confined to infrequent but apparently necessary emergency use in combatting highly-organized crime syndicates.

Extracts from the report of the hearings follow:

Page 2: Order of the Attorney General of January 19, 1931 (still in effect):

> No tapping of wires should be permitted to any agent of the Department without the personal direction of the Chief of the Bureau involved, after consultation with the Assistant Attorney General in charge of the case.

Page 17: Analysis of the available methods of investigation against highly organized crime syndicates:

> 4. The various avenues of investigation open to the Bureau against such a syndicate may be substantially classified as follows:
>
> (1) Open investigation.
>
> (a) Following logically all leads originating from some substantive violation to their final analysis.
>
> (b) Statements to be obtained from disinterested parties who, by virtue of a particular position that they are in, are in a position to know of some element of the crime.
>
> (c) Statements to be obtained from employees of the syndicate, or, in other words, confessions.
>
> (2) Undercover investigation.
>
> (a) The placing of a duly authorized agent into the syndicate, under the subterfuge of an employee, through whatever medium is available.
>
> (b) The purchase of liquor by an authorized agent, with a view to a substantive offense case.

(c) The use of the paid or unpaid informant.

(d) Shadowing, observing, and all undercover mediums (not effective alone and usually only corroborative).

(e) Statements to be obtained from employees of the syndicate, or, in other words, wire tapping.

5. First considering the subject of open investigation, this medium, of course, is necessarily the one by which all cases are ultimately perfected. However, against the highly organized liquor syndicate it is virtually useless, unless an undercover background has been skillfully laid upon which an open investigation may be predicated. * * *

6. Times have changed. The highly organized syndicate, or mob, with its methods of intimidation, its strong political connections, and its highly organized illegal methods of procedure renders the sole method of open investigation entirely inadequate. * * *

10. All other means of undercover investigation against the large syndicate, such as shadowing, observing, etc., when used alone are not effective and are usually corroborative as investigative mediums.

11. Now coming to the wire tap, after having eliminated other means when used alone or together as not being adequate, I shall discuss the necessity of the wire tap as against the syndicate. * * *

13. In eliminating the various other methods of investigation as against the liquor syndicate, I do not want it understood that such methods of investigation are not usable against the large syndicate. These are very valuable, and are used in conjunction with wire tap investigation and all other methods. Wire tapping is an emergency means of investigation. It is the type of investigation that is to be used when all other methods fail. * * *

Page 20: Detailed description of types of cases in which wire tapping was found necessary:

774–M. This case relates to the conspiracy on the part of 32 individuals operating in and around Terre Haute, Ind. This combine was headed by some six members of the old Traum gang, bank robbers in Illinois both prior to and since prohibition. This combine operated under its immediate supervision 37 large stills in and around Terre Haute. All of the stills in question were not owned by the syndicate, but were syndicated and tribute of some $15,000 a week was exacted from the independent operators. Numerous murders were committed during the operation of the conspiracy by this gang, some of which were cleared up in connection with the investigation. Six machine guns were seized. One of the principals in this case, Jake Traum, was arrested in connection with the Lingle murder in Chicago. Twenty-nine of the thirty-two defendants in this case were convicted by jury.

574–M. This case involves four members of the notorious "Purple gang" in Detroit, all four of whom were convicted and given the maximum sentence under the statute under which they were indicted. These individuals had been acquitted in the State court at Detroit on charges of murder, kidnapping, extortion, and other major crimes. This combine was also given a great deal of publicity by the newspapers following the St. Valentine's day massacre in Chicago, as being perpetrators of that crime.

177–S. This case involves the Pascuzzi-Goldberg gang in Detroit. The principals in this combine were convicted as the result of a wire-tap investigation, one of whom was Joe Moceri, listed as a public enemy in Detroit and recently held in connection with the Buckley radio murder there. Another defendant also convicted in the same case was Sam Goldberg, former New York confidence man, who did a long stretch at Sing Sing Penitentiary in New York at one time.

Page 21: Table showing the proportionate number of cases in which the wire tap was used:

	Total number of cases in which wire tap was used	Total number of cases made in the bureau
1928	6	57,973
1929	40	60,664
1930 [1]	60	57,228

[1] Larger number in 1930 may be due to bureau's effort to concentrate on larger cases.

Page 24: Statement of Attorney General Mitchell concerning wire tapping and intercepting radio messages:

> Of course, the question of wire tapping is a broad one. It involves the general question of what you might call eavesdropping, and it is a question of how polite the Government is going to be in its efforts to detect crime. I do not believe that anybody disagrees about the proposition that indiscriminate wire tapping ought not to be allowed. If it is to be used at all, it should be used in a limited class of cases under the most careful supervision. These gangsters and desperate criminals, whether they are violating the prohibition law or any other law, are equipped with every modern convenience and every modern invention. They are difficult to deal with. If you prohibit wire tapping, you must consider a lot of other things. You must consider whether you will prohibit eavesdropping and require detectives in a position to overhear conversations to refrain from doing so.
>
> Then there is the question of radio, and I would like to call the attention of the committee to the situation about that. In Forty-fourth Statutes at Large, page 1172, United States Code, title 47, section 107, there is a statute that prohibits the divulging of the contents of any radio communication to any persons other than the addressee, and the interception of any message and divulging its contents to an unauthorized per-

son. That is a Federal statute, and it does not say anything about police officers or Federal officers at all. I think, however, it it has been construed not to apply to Federal officers, because the Commerce Department itself is busily engaged all the time in checking and intercepting messages for the purpose of preventing the improper use of radio, and I know that the Prohibition Unit has detected and brought to punishment some of the biggest liquor importation, smuggling, and conspiracy cases that we have had along the Atlantic coast where radio has been used and radio messages intercepted.

Page 27: Dialogue between Attorney General Mitchell and Congressman Schafer, the author of H. R. 5416, *supra:*

Mr. MITCHELL. The order I made requires that there shall not be any wire tapping under any bureau unless the particular circumstances of the individual case are brought to the attention of the chief of the bureau and the Assistant Attorney General, to determine whether it is a case that justifies it. There is one thing that we should bear in mind about this subject, and that is that nowadays a good many of the rules of law that regulate the Government in its efforts to detect crimes or criminals are being established by the courts in cases that are coming up involving the prohibition law, and that public sentiment about such things as wire tapping is being crystallized, appar-

ently, under conditions of that kind. Now, what is sauce for the goose is sauce for the gander, and it makes a lot of difference whose ox is being gored. For my part it seems to me that we should give it very careful consideration before we adopt any rule that forbids a practice of this kind under all conditions. I can imagine many cases where I would be willing to say right now that I would resort to wire tapping. A Bureau of Investigation agent was found shot to death a few months ago under circumstances that indicated that a gang of narcotic traffickers had "bumped" him off.

Now, if some agent of the Bureau of Investigation had come around to me and said that they had reason to believe that they could bring the perpetrators of that crime to justice, or that they could detect the perpetrators of the crime by tapping his telephone wires, I would have had great difficulty in saying, "I do not think it ought to be done." There are a great many other cases coming up where you might, I think, hesitate yourself to reach a decision about it. I was not prepared in January to lay down an iron-clad rule to apply to all cases under all circumstances, and I am not prepared to do that now.

Mr. SCHAFER. You have taken several long steps in the right direction. Now, if my understanding of your regulation promulgated in January is correct, when these Federal prohibition agents or special agents are operating, they can not tap a telephone

or telegraph wire unless they present reasonable facts in behalf of their request, and that request is favorably acted upon by the chief of the bureau.

Mr. MITCHELL. That is true. Now, you will find, if you will look at this paper containing a statement of those cases in which the bureau has resorted to wire tapping, that they are cases in which they were dealing with gangsters and desperate criminals. These modern gangsters, with whom liquor is only one of the rackets, have no regard for life, property, decency, or anything else. They are a desperate lot, and they use every scientific method to escape detection. I have no doubt that they tap the wires leading into the offices of the United States attorneys and prohibition offices in order to find out what is being done. It would be handicapping the Government to prevent wire tapping by it in such cases, * * *.

Page 31: Attorney General Mitchell:

I want to call attention to the fact that, as far as I have gone on this subject in the brief time I have had to give any consideration to it, I have reached the conclusion that the indiscriminate use of wire tapping in any bureau of the department ought not to be permitted; and I made a regulation which does not permit wire tapping in any case but leaves it open for decision in any concrete case that might come up as to whether it should be resorted to or not.

With prohibition still in effect, the question of wire tapping was still a very live one in the 72d

Congress. Four separate bills were proposed prohibiting wire tapping and making evidence obtained by wire tapping inadmissible—H. R. 23, H. R. 5305, H. R. 9893, and S. 1396. None passed.

H. R. 23, introduced on December 8, 1931, prohibited the use of the wire tap to officers of the United States, and made evidence so obtained inadmissible in any court of the United States. H. R. 5305, introduced on December 10, 1931, was a companion measure to S. 1396, introduced on the same day and entitled:

> A bill to render evidence obtained by wire tapping inadmissible in the Federal Courts.

H. R. 9893 was introduced February 27, 1932, and was entitled:

> A bill to prohibit the tapping of telephone and telegraph lines and prohibit the use of information obtained by such illegal tapping to be used as evidence in the Courts of the United States in civil suits and criminal prosecutions and for other purposes.

Once again on February 23, and again on February 25, 1932, the subject of obtaining evidence by wire tapping was debated in the House of Representatives, and again reference was made to this Court's decision in the *Olmstead* case. Cong. Rec., Vol. 75, Part 4, pp. 4546, 4733. The Committee on the Judiciary of the House of Representatives asked the Attorney General on April 11, 1932 for a report and recommendation on H. R. 5305, *supra*. The Attorney General replied on May 9, 1932:

> I do not recommend enactment of this measure. Regulations in force in this Department prohibit wire tapping without the express permission, in every case, of the chief of the investigative bureau dealing with the case and of the Assistant Attorney General in charge.

The Department of Justice Appropriation Act for the year ending June 30, 1934, approved March 1, 1933, contained the following provision:

> *Provided,* That no part of this appropriation shall be used for or in connection with "wire tapping" to procure evidence of violations of the National Prohibition Act, as amended and supplemented: * * * [47 Stat. 1381.]

An amendment to the provision submitted in the Senate on February 10, 1933, to except such cases of wire tapping as were authorized by the Assistant Attorney General in charge of prosecuting violations of the National Prohibition Act, was tabled. Cong. Rec., Vol. 76, Part 4, p. 3745. The provision enacted was passed after extensive debate in the Senate with further consideration of the *Olmstead* case. Cong. Rec., Vol. 76, Part 4, pp. 4235–4242.

The provision of the Department of Justice Appropriations Act for the year 1934 was confined to prohibiting the use of appropriations for wire tapping only so far as securing evidence for violations of the National Prohibition Act was concerned. Its duration was limited to one year, the last year the 18th Amendment was in effect. It was the only

direct restriction passed by Congress on the use of wire tapping since the decision of this Court in the *Olmstead* case. The extensive debates and hearings on the various rejected proposals to prohibit or limit wire tapping and make evidence so obtained inadmissible readily suggest that the antipathy in Congress, such as it was, toward the limited practice of wire tapping, was primarily concerned with wire tapping for the purpose of securing convictions under the increasingly unpopular 18th Amendment and the National Prohibition Act. With the repeal of prohibition the interest of Congress in legislation prohibiting wire tapping and making evidence so obtained inadmissible seems to have gone. Except for Section 605 of the Communications Act passed by the 73d Congress, not one proposal in the 73d, 74th and 75th (first session) Congresses related to the subject of wire tapping.

(B) SECTION 605 OF THE FEDERAL COMMUNICATIONS ACT OF 1934

The acrimonious, lengthy debates and extensive Congressional investigations which accompanied the rejection of the many proposals to prohibit wire tapping and wire tapping evidence should be contrasted with the passage of the Federal Communications Acts of 1934. Debates in Senate and House, during which many phases of the Communications Act were discussed, are silent on the subject of wire tapping, and on Section 605. Not one word is said about making evidence obtained by

wire tapping inadmissible in evidence, or about prohibiting wire tapping. The *Olmstead* case is nowhere mentioned. See Cong. Rec., 73d Cong., 2d Sess. pp. 4138, 8822–8837, 8842–8854, 10304–10332.

Indeed the intent of Congress in passing the Communications Act was apparently not to change existing law but only to change administrative jurisdiction over enforcement of the presently existing regulatory measures for interstate communications. The Committee on Interstate and Foreign Commerce of the House of Representatives in its report on the Communications Act states:

> * * * it is the primary purpose of this bill to create such a commission armed with adequate statutory powers to regulate all forms of communication and to consider needed additional legislation. The bill is largely based upon existing legislation and except for the change of administrative authority does not very greatly change or add to existing law; most controversial questions are held in abeyance for a report by the new commission recommending legislation for their solution. [H. Rept. No. 1850, 73d Cong. 2d Sess., p. 3.]

The report of the Senate Committee on Interstate Commerce in submitting the Communications Act of 1934 says of the purpose of that Act:

> The purpose of this bill is to create a Communications Commission with regulatory power over all forms of electrical com-

> munication, whether by telephone, telegraph, cable, or radio. [S. Rept. No. 781, 73d Cong., 2d Sess., p. 1.]

So too it was the understanding of the chairmen of both Congressional committees which considered the bill that it merely provided new administration of old regulatory law. Chairman Dill explained the effect of the Communications Act to the Senate:

> The bill * * * simply writes into law the existing provisions relating to the control of the telephone and telegraph business now contained in the Interstate Commerce Act, and the provisions of the radio law * * * now being enforced by the Federal Radio Commission. [Congressional Record, 73d Cong. 2d Sess. p. 4138.]

And to identical effect is the explanation of the bill by Chairman Rayburn in the House:

> * * * the bill as a whole does not change existing law, not only with reference to radio but with reference to telegraph, telephone, and cable, except in the transfer of the jurisdiction and such minor amendments as to make that transfer effective. [*Id.* p. 10313.]

And that such, too, was the understanding of the whole House is further evidenced by the following dialogue, there occurring:

> Rep. FULMER. Is it not a fact that about all this bill hopes to accomplish is to transfer the activities of the Radio Commission

> and certain jurisdiction on the part of the Post Office Department and the Interstate Commerce Commission to this new commission?
>
> Mr. MERRITT [Member of the Committee]. That is right. [*Id.* p. 10317.]

If Congress in passing a bill which was intended to effect a change in administrative jurisdiction over interstate communications, had, nevertheless, also intended to repudiate the doctrine of the *Olmstead* case, it would have used language expressly prohibiting the use in the Federal courts of evidence obtained by wire tapping. With such express language, Congress was long familiar. At least, Congress would have gone as far as did the statute in the *Olmstead* case, see p. 13, *supra*, and denounced the act of wire tapping. But Section 605 does not denounce wire tapping *per se* but provides "no person not being authorized by the sender shall *intercept* any communication *and divulge or publish*" etc. Interception is coupled with publication, and it is the combination of both which constitutes the act denounced. That the purpose of the language quoted was to prohibit unauthorized publication rather than wire tapping is shown by its context in Section 605, and by the Committee reports. The provisions of Section 605, *supra*, p. 2, are as a whole directed at unauthorized publication. And the Committee reports in explaining the intent of Section 605 state:

> Section 605, prohibiting unauthorized publication of communications, is based

> upon Section 27 of the Radio Act and extends it to wire communications. [S. Rept. No. 781, 73d Cong., 2d Sess., p. 11.]
>
> Section 605, prohibiting unauthorized publication of communications, is based upon Section 27 of the Radio Act but is also made to apply to wire communications. [H. Rept. No. 1850, 73d Cong., 2d Sess. p. 9.]

As stated by the Committee reports, Section 605 merely carried over the provisions of Section 27 of the Radio Act of 1927 into the Communications Act of 1934, and there applied those provisions to wire communications as well as radio. Indeed the language in Section 605 relied on by petitioners is identical except for one word with the language of Section 27 of the Radio Act of 1927:

> * * * no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person * * *. [Act of February 23, 1927, c. 169, Sec. 27, 44 Stat. 1162, 1172.]

The Communications Act of 1934 changed the word "message" to the word "communication". The Radio Act was in effect at the time *Olmstead* v. *United States* was decided and was called to the Court's attention by counsel, contending that it protected the privacy of communications, 277 U. S. 446; and the Act is quoted in a footnote to the dissenting opinion of Mr. Justice Brandeis, p. 481.

It cannot be thought that without discussion and by changing one word Congress intended to alter the effect of a leading decision of this Court affirming an established common law principle.

That Congress in Section 605 did not intend to eliminate evidence of telephone conversations is further evidenced by the care Congress took in providing in that section:

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish * * * to any person other than the addressee * * * except * * * in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; * * *

The provision applies as much to telephones as it does to radio and telegraph. Because of obvious physical limitations, however, a search warrant or subpena for a telephone message would be ineffective. The provision quoted guards in effect against loss to the courts of relevant evidence contained in telegrams and radiograms. The letters, private effects, telegrams and radiograms of criminal conspirators can be made available by search warrant and subpena. We do not believe that Congress intended their telephone conversations to be immune. Managers of such conspiracies, far from the scene of action, might otherwise direct every step of the operations of their agents and yet, in those cases where wire tapping affords the only

available evidence, be secure in the knowledge that their relationship to the crime could not be revealed in court.

Despite these considerations, and despite the criticism leveled at the doctrine of *Weeks* v. *United States*, 232 U. S. 383,[4] Congress might, of course, repudiate the doctrine of the *Olmstead* decision and make inadmissible in the Federal courts evidence obtained by interception of telephone messages. Cf. the reasoning of Justice Brandeis at p. 474 of his dissenting opinion in the *Olmstead* case. But there is nothing to indicate that Congress so intended in passing the Communications Act of 1934.

Indeed, petitioners' construction of Section 605 violates a fundamental principle of statutory construction. The principle, old in the common law (see *Blackstone's Commentaries,* Book I, p. 247; *Kent's Commentaries,* p. 460), was concisely stated by Justice Story, sitting in the Circuit Court for the First Circuit in the case of *United States* v. *Samuel Hoar,* 2 Mason 311, 314–315:

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[4] In *Weeks* v. *United States* and cases following it, this Court laid down the doctrine that admission of evidence, obtained by search and seizure of Federal officers in violation of the Fourth Amendment, would constitute a violation of the Fifth Amendment. Hence it is held in those cases that evidence so obtained is inadmissible. That exception to the common law rule, although based upon constitutional limitations, was nevertheless rejected by the large majority of State courts. See *People* v. *Defore,* 242 N. Y. 13, certiorari denied, 270 U. S. 657, and authorities therein cited.

> It appears to me, therefore, to be a safe rule founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act * * *

The principle has various modern applications. See, for example, *People* v. *Hebberd,* 96 Misc. 617, 620 (Sup. Ct. N. Y.) (Police Commissioner did not wrongfully and criminally obtain knowledge of telephone conversations since he acted only in official capacity for detection of crime); *Balthasar* v. *Pacific Electric Ry. Co.,* 187 Calif. 302 (Motor Vehicle Act not applicable to the Government or its agencies unless expressly included by name); *Lilly* v. *West Virginia,* 29 F. (2d) 61 (C. C. A. 4th) (speed statute, containing no express exclusion from broad general provisions, not applicable to law enforcement officers). Here if Section 605 is to exclude evidence proffered by the United States in the Federal courts then the phrase "no person . . . shall intercept . . . and divulge . . . to any person" must be construed as including the Government of the United States. But as this Court held in *Dollar Savings Bank* v. *United States,* 19 Wall. 227, 239, "the most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not" the Government of the United States "in the least" unless

it be named in the statute by "special and particular words."

Finally, it should be noted that the contention of petitioners goes both too far and not far enough. If the language "no person not being authorized by the sender shall intercept any communication and divulge or publish * * * to any person" were to include divulgence by way of evidence in the Federal courts, then such language would also include divulgence in the State courts. There could be no differentiation between Federal and State courts in the language quoted. Thus Congress would be establishing a rule of evidence for the State courts. But nowhere is there to be found any indication of the intention of Congress to exercise so doubtful a jurisdiction. Cf. *Olmstead* v. *United States,* at p. 469; *Craig* v. *Dimock,* 47 Ill. 308; *Hunter* v. *Cobb,* 1 Bush (Ky.) 239. Nor could any differentiation be made on this language between evidence obtained by the wire tapping of Federal officers, and evidence obtained by the wire tapping of State officers and other individuals. Yet there is not the slightest evidence of the intention of Congress to reject the doctrine of the decisions of this Court in *Burdeau* v. *McDowell,* 256 U. S. 465; *Center* v. *United States,* 267 U. S. 575; *Weeks* v. *United States,* 232 U. S. 383, 389. These cases establish the rule that the Federal Government, in the absence of wrongdoing on the part of its officers, may use evidence no matter how it was obtained by individuals (usually State officers) un-

connected with the Federal Government or Federal officers.

If Congress saw fit to change the rule of the *Olmstead* case, it could prohibit the introduction in evidence in the Federal courts of all intercepted messages whether such messages were interstate or not. But Section 605, especially when read in the light of the purpose stated in Section 1 of "regulating interstate and foreign commerce in communication by wire and radio * * *,"[5] applies only to interstate messages. Thus if petitioners are right in their contention that Section 605 prohibits the admissibility of evidence obtained by wire tapping, interstate messages are to be excluded, but intrastate messages may be admitted. Yet such distinction bears no relation whatever to a policy of making evidence obtained by wire tapping inadmissible. It is not reasonably conceivable that Congress, with full power to prohibit all wire tapping evidence in the Federal courts, should for no apparent reasons of policy stop short at the arbitrary line of distinction between interstate and intrastate communications.

(C) CASE LAW ON THE EFFECT OF SECTION 605 UPON THE RULE OF THE OLMSTEAD CASE

That Section 605 does not affect the admissibility in evidence of conversations overheard by tapping telephone wires is the opinion of the only two

[5] 48 Stat. 1064.

Federal appellate courts which have passed on the question. The court below held, 90 F. (2d) 630 (R. 331):

> The above mentioned statute subsequently passed by Congress is silent as to the admissibility of messages intercepted contrary to its provisions. As Congress did not see fit to adopt the suggestion of direct legislation to make such evidence inadmissible, we are, of course, bound to enforce the law as declared in the above case [*Olmstead* v. *United States*]. That would dispose of the point flatly were it a state rather than a federal law which forbade the interception of these messages. Yet in principle there is no distinction. Since there is no constitutional prohibition of their admission in evidence, it is necessary to their exclusion that some statute must so provide. Evidently Congress did not care for such a policy.

The Court of Appeals for the District of Columbia in *Smith* v. *United States,* 91 F. (2d) 556 (App. D. C., 1937), with the same question before it held:

> The second assignment relied upon by appellants is that evidence secured by wire tapping was admitted by the trial court against the objections and exceptions of appellants. This assignment must be overruled upon the authority of *Olmstead* v. *United States,* 277 U. S. 438. See also *Beard* v. *United States,* 65 App. D. C. 231; 82 F. (2d) 837. It is also alleged by appellants that such evidence was illegal under

> the provisions of the act of Congress commonly known as the Communications Act of 1934, sec. 605, title 47, U. S. C. We cannot, however, sustain this contention. *Olmstead* v. *United States, supra.*

Cf. *Cole* v. *Ralph,* 252 U. S. 286, 293-294; *United States* v. *Viess,* 273 Fed. 279 (W. D. Wash.). Moreover, although the Communications Act was not the basis of the petitions for certiorari, this Court after the Act was passed denied certiorari in two cases upholding the admissibility of intercepted telephone messages. *Jenello* v. *United States,* 10 F. Supp. 751 (M. D. Pa., 1935), reversed, 78 F. (2d) 1020 (C. C. A. 3d, 1935), certiorari denied, 296 U. S. 623, rehearing denied, 296 U. S. 662; *Beard* v. *United States,* 82 F. (2d) 837 (App. D. C., 1935), certiorari denied, 298 U. S. 655. And finally it may be noted that, despite numerous State statutes prohibiting wire tapping, see p. 17, *supra,* and *Olmstead* v. *United States,* at p. 479, note 12, petitioners do not cite, nor have we been able to find, any case which construes such a statute as making evidence obtained by wire tapping inadmissible.

Hearst v. *Black,* 87 F. (2d) 68 (App. D. C.), relied on by petitioners, is not relevant to the question at bar. Hearst in that case sued for an injunction to restrain a Senate Committe and the Federal Communications Commission from making use of copies of telegrams in the possession of

the telegraph company which had been sent by Hearst to his employees. Under allegations of the bill, deemed admitted, the defendants had examined and copied many telegrams sent by Hearst which had no relation to the matters under investigation by the Senate Committee. The District Court dismissed the bill for lack of jurisdiction as against the Senate Committee, and denied an injunction against the Commission on the disclaimer of the Commission of any further activity against the plaintiff. The appellate court affirmed. There are dicta in its opinion to the effect that the alleged action of the Commission in arbitrarily seizing numerous messages sent by Hearst was illegal. But the court did not purport in any way to pass upon the effect of Section 605 in making inadmissible evidence obtained by wire tapping or any other means.

Several questions not pertaining to the admissibility of the evidence obtained by wire tapping are urged on behalf of petitioner Nardone. The question involved in the joint petition for certiorari filed by all petitioners is stated to be (p. 3):

> Assuming that the interception of telephone messages was unlawful, was their introduction into evidence error?

Under the heading "Specifications of Errors to be Urged" in the petition there appears only the following (pp. 5–6):

> It is respectively submitted that the Circuit Court of Appeals misinterpreted the

explicit provisions of Title 47, U. S. C. A., Section 605, which is a part of the Federal Communications Act of June 19th, 1934, in approving of the introduction into evidence of the contents of 72 telephone messages, many of which were interstate, unlawfully intercepted by government agents, in an attempt to obtain evidence against these defendants.

The entire argument of the petitioner and "Reasons for Allowance of Writ" (pp. 4, 6–8) are directed to the sole question of the admissibility of wire tapping evidence under Section 605 of the Communications Act of 1934. The petitioners may not here urge other contentions which are entirely unrelated to that question. *Prudence Co.* v. *Fidelity & Deposit Co.*, 297 U. S. 198, 208; *Helvering* v. *Taylor*, 293 U. S. 507, 511; *Steele* v. *Drummond*, 275 U. S. 199, 203.

CONCLUSION

For the foregoing reasons the judgment of the court below should be affirmed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

No. 190.—October Term, 1937.

Frank Carmine Nardone, et al., Petitioners, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 20, 1937.]

Mr. Justice Roberts delivered the opinion of the Court.

The importance of the question involved,— whether, in view of the provisions of Section 605 of the Communications Act of 1934,[1] evidence procured by a federal officer's tapping telephone wires and intercepting messages is admissible in a criminal trial in a United States District Court,—moved us to grant the writ of certiorari.

The indictment under which the petitioners were tried, convicted, and sentenced, charged, in separate counts, the smuggling of alcohol, possession and concealment of the smuggled alcohol, and conspiracy to smuggle and conceal it. Over the petitioners' objection and exception federal agents testified to the substance of petitioners' interstate communications overheard by the witnesses who had intercepted the messages by tapping telephone wires. The court below, though it found this evidence constituted such a vital part of the prosecution's proof that its admission, if erroneous, amounted to reversible error, held it was properly admitted and affirmed the judgment of conviction.[2]

Section 605 of the Federal Communications Act provides that no person who, as an employe, has to do with the sending or receiving of any interstate communication by wire shall divulge or publish it or its substance to anyone other than the addressee or his authorized representative or to authorized fellow employes, save in response to a subpoena issued by a court of competent jurisdiction or on demand of other lawful authority; and "no person not being

[1] Ch. 652, 48 Stat. 1064, 1103; U. S. C. Tit. 47, § 605.

[2] 90 F. (2d) 630. See also Smith v. United States, 91 F. (2d) 556.

authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person; . . .'" Section 501[3] penalizes wilful and knowing violation by fine and imprisonment.

Taken at face value the phrase "no person" comprehends federal agents, and the ban on communication to "any person" bars testimony to the content of an intercepted message. Such an application of the section is supported by comparison of the clause concerning intercepted messages with that relating to those known to employes of the carrier. The former may not be divulged to any person, the latter may be divulged in answer to a lawful subpoena.

The government contends that Congress did not intend to prohibit tapping wires to procure evidence. It is said that this court, in *Olmstead* v. *United States,* 277 U. S. 438, held such evidence admissible at common law despite the fact that a state statute made wire-tapping a crime; and the argument proceeds that since the *Olmstead* decision departments of the federal government, with the knowledge of Congress, have, to a limited extent, permitted their agents to tap wires in aid of detection and conviction of criminals. It is shown that, in spite of its knowledge of the practice, Congress refrained from adopting legislation outlawing it, although bills, so providing, have been introdueed. The Communications Act, so it is claimed, was passed only for the purpose of reenacting the provisions of the Radio Act of 1927[4] so as to make it applicable to wire messages and to transfer jurisdiction over radio and wire communications to the newly constituted Federal Communications Commission, and therefore the phraseology of the statute ought not to be construed as changing the practically identical provision on the subject which was a part of the Radio Act when the *Olmstead* case was decided.

We nevertheless face the fact that the plain words of Section 605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that *"no person"* shall divulge or publish the message or its substance to *"any person"*. To recite the contents of the message in testimony before a court is to divulge the message. The conclusion that the act forbids such testimony seems to us unshaken by the government's arguments.

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[3] Ch. 652, 48 Stat. 1064, 1100, U. S. C. Tit. 47, § 501.

[4] Act of Feb. 23, 1927, ch. 169, 44 Stat. 1162.

True it is that after this court's decision in the *Olmstead* case Congressional committees investigated the wire-tapping activities of federal agents. Over a period of several years bills were introduced to prohibit the practice, all of which failed to pass. An Act of 1933 included a clause forbidding this method of procuring evidence of violations of the National Prohibition Act.[5] During 1932, 1933 and 1934, however, there was no discussion of the matter in Congress, and we are without contemporary legislative history relevant to the passage of the statute in question. It is also true that the committee reports in connection with the Federal Communications Act dwell upon the fact that the major purpose of the legislation was the transfer of jurisdiction over wire and radio communication to the newly constituted Federal Communications Commission. But these circumstances are, in our opinion, insufficient to overbear the plain mandate of the statute.

It is urged that a construction be given the section which would exclude federal agents since it is improbable Congress intended to hamper and impede the activities of the government in the detection and punishment of crime. The answer is that the question is one of policy. Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty. The same considerations may well have moved the Congress to adopt Section 605 as evoked the guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution.

The canon that the general words of a statute do not include the government or affect its rights unless the construction be clear and indisputable upon the text of the act does not aid the respondent. The cases in which it has been applied fall into two classes. The first is where an act, if not so limited, would deprive the sovereign of a recognized or established prerogative title or interest.[6] A classical instance is the exemption of the state from the operation of

[5] Department of Justice Appropriation Act of March 1, 1933, 47 Stat. 1381.

[6] The Dollar Savings Bank *v.* United States, 19 Wall. 227, 239; United States *v.* Herron, 20 Wall. 251, 263; United States *v.* American Bell Telephone Co., 159 U. S. 548, 554; United States *v.* Stevenson, 215 U. S. 190, 197; Title Guaranty & Surety Co. *v.* Guarantee Title & Trust Co., 174 Fed. 385, 388; Maxwell, Interpretation of Statutes (7th Ed.) 117, 121; Black on Interpretation of Laws (2d Ed.) 94.

general statutes of limitation.[7] The rule of exclusion of the sovereign is less stringently applied where the operation of the law is upon the agents or servants of the government rather than on the sovereign itself.[8]

The second class,—that where public officers are impliedly excluded from language embracing all persons,—is where a reading which would include such officers would work obvious absurdity as, for example, the application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm.[9]

For years controversy has raged with respect to the morality of the practice of wire-tapping by officers to obtain evidence. It has been the view of many that the practice involves a grave wrong. In the light of these circumstances we think another well recognized principle leads to the application of the statute as it is written so as to include within its sweep federal officers as well as others. That principle is that the sovereign is embraced by general words of a statute intended to prevent injury and wrong.[10]

The judgment must be reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.

So ordered.

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[7] United States *v.* Hoar, 2 Mason, 311, 314-315.

[8] "The prohibitions [against any form of action except that specified in the statute] if any, either express or implied . . . are for others, not for the government. They may be obligatory on tax collectors. They may prevent any suit at law by such officers or agents." The Dollar Savings Bank *v.* United States, 19 Wall. 227, 239. "These provisions unmistakably disclose definite intention on the part of Congress effectively to safeguard rivers and other navigable waters against the unauthorized erection therein of dams or other structures for any purpose whatsoever. The plaintiff maintains that the restrictions so imposed apply only to work undertaken by private parties. But no such intention is expressed, and we are of opinion that none is implied. The measures adopted for the enforcement of the prescribed rule are in general terms and purport to be applicable to all. No valid reason has been or can be suggested why they should apply to private persons and not to federal and state officers. There is no presumption that regulatory and disciplinary measures do not extend to such officers. Taken at face value the language indicates the purpose of Congress to govern conduct of its own officers and employees as well as that of others." United States *v.* Arizona, 295 U. S. 174, 184. Compare Stanley *v.* Schwalby, 147 U. S. 508, 515; Donnelley *v.* United States, 276 U. S. 505, 511.

[9] Balthasar *v.* Pacific El. Ry. Co., 187 Cal. 302; State *v.* Gorham, 110 Wash. 330.

[10] United States *v.* Knight, 14 Pet. 301, 315; United States *v.* Herron, 20 Wall. 251, 263; Black on Interpretation of Laws (2d Ed.) 97.

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[December 20, 1937.]

Mr. Justice Sutherland, dissenting.

I think the word "person" used in this statute does not include an officer of the federal government, actually engaged in the detection of crime and the enforcement of the criminal statutes of the United States, who has good reason to believe that a telephone is being, or is about to be, used as an aid to the commission or concealment of a crime. The decision just made will necessarily have the effect of enabling the most depraved criminals to further their criminal plans over the telephone, in the secure knowledge that even if these plans involve kidnapping and murder, their telephone conversations can never be intercepted by officers of the law and revealed in court. If Congress thus intended to tie the hands of the government in its effort to protect the people against lawlessness of the most serious character, it would have said so in a more definite way than by the use of the ambiguous word "person". *Commonwealth* v. *Welosky*, 276 Mass. 398, 403-404, 406. For that word has sometimes been construed to include the government and its officials, and sometimes not. I am not aware of any case where it has been given that inclusive effect in a situation such as we have here. Obviously, the situation dealt with in *United States* v. *Arizona*, 295 U. S. 174, was quite different. There, a federal statute forbade the construction of any bridge, etc., in any port, etc., "until the consent of Congress shall have been obtained." The mere building of the designated structure, in the absence of congressional consent, violated the statute. There was no ambiguous term, such as we have here, or anything else in the language, requiring construction.

There is a manifest difference between the case of a private individual who intercepts a message from motives of curiosity or to further personal ends, and that of a responsible official engaged in the governmental duty of uncovering crime and bringing criminals to justice. It is fair to conclude that the word "person" as here used was intended to include the former but not the latter. This accords with the well-settled general rule stated by Justice Story in *United States* v. *Hoar*, 2 Mason 311, 314-315, 26 Fed. Cas. 329, 330: "In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary force to the government itself. It appears to me, therefore, to be a safe rule founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act." And see *In the Matter of Will of Fox*, 52 N. Y. 530, 535. Compare *State* v. *Gorham*, 110 Wash. 330; *Balthasar* v. *Pacific Elec. Ry. Co.*, 187 Cal. 302, 305-308. A case in point is that of *People* v. *Hebberd* (Sup. Ct. N. Y.), 96 Misc. 617, 620-621.

In the investigations of the congressional committees, referred to in the opinion of the court, it appeared that the Attorney General had ordered that no tapping of wires should be permitted without the personal direction of the chief of the bureau, after consultation with the Assistant Attorney General in charge of the case; and that such means were to be adopted only as an emergency method. The Attorney General himself appeared before one of the committees and pointed out that crime had become highly organized, with strong political connections and illegal methods of procedure; that gangsters and desperate criminals had equipped themselves with every modern convenience and invention; that modern gangsters have no regard for life, property, decency or anything else; and he had no doubt that they tapped wires leading to offices of the United States attorneys to find out what was being done. He cited the case of a Bureau of Investigation agent who had been found shot to death under circumstances which indicated that a gang of narcotic traffickers had murdered him; and he posed the question whether, if it had appeared that the perpetrators of the crime could be detected and brought to justice by tapping their telephone wires, nevertheless, that ought not to be done.

The answer of Congress to the question has been a refusal to pass any of the bills which comprehensively proposed to forbid the practice.

My abhorrence of the odious practices of the town gossip, the peeping Tom, and the private eavesdropper is quite as strong as that of any of my brethren. But to put the sworn officers of the law, engaged in the detection and apprehension of organized gangs of criminals, in the same category, is to lose all sense of proportion. In view of the safeguards against abuse of power furnished by the order of the Attorney General, and in the light of the deadly conflict constantly being waged between the forces of law and order and the desperate criminals who infest the land, we well may pause to consider whether the application of the rule which forbids an invasion of the privacy of telephone communications is not being carried in the present case to a point where the necessity of public protection against crime is being submerged by an overflow of sentimentality.

I think the judgment below should be affirmed.

Mr. Justice McReynolds joins in this opinion.